TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 410

ADAM THOMAS, PETITIONER,

vs.

HEMPT BROTHERS, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED OCTOBER 23, 1952
CERTIORARI GRANTED DECEMBER 8, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

ADAM THOMAS, PETITIONER,

vs.

HEMPT BROTHERS, A PARTNERSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 16, 1952.

—4406

[fol. a]

IN THE SUPREME COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT, JANUARY TERM, 1952

No. 66

ADAM THOMAS, Appellant,

vs.

HEMPT BROTHERS, Appellee

RECORD

Appeal from the Judgment of the Court of Common Pleas of Cumberland County at No. 6, September Term, 1947

Mark E. Garber, Carlisle Pa., Henry C. Kessler, Jr., York, Pa., Attorneys for Appellant.
25 South Duke Street, York, Pennsylvania.

[fol. 1] IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, SEPTEMBER TERM, 1947

No. 6

ADAM THOMAS, Plaintiff,

vs.

HEMPT BROTHERS, Defendant

I

RELEVANT DOCKET ENTRIES

May 13, 1947, Praecipe for summons in Assumpsit filed.
May 13, 1947, Complaint in Assumpsit filed.
June 25, 1947, Preliminary Objections filed.
July 7, 1947, Answer to Preliminary Objections filed.
[fol. 1a] March 31, 1948, Opinion and Order of Court filed sustaining Preliminary Objection (62 D. & C. 618, 1948).

April 6, 1948, Petition for Rule to Show Cause and Order of Court filed.

April 27, 1948, Answer filed.

Jan. 18, 1949, Opinion and Order of Court filed.

July 11, 1949, Amended Complaint in Assumpsit filed.

Aug. 1, 1949, Answer to Amended Complaint filed.

Sept. 15, 1949, Plaintiff's Reply to New Matter filed.

Oct. 1, 1949, Motion for Judgment on the Pleadings filed.

Nov. 1, 1949, Plaintiff's answer to Defendant's Motion for Judgment on the Pleadings filed.

Oct. 28, 1950, Opinion and Order of Court filed (74 D. & C. 213, 1950).

Nov. 18, 1950, Amended Complaint in Assumpsit filed.

Dec. 4, 1950, Preliminary Objection to Amended Complaint filed.

Aug. 8, 1951, Opinion and Order of Court filed.

> "And now, August 8, 1951 the Motion of the Defendant in the nature of a Demurrer is granted and Judgment is entered in favor of the Defendant, Hempt Brothers, and against the Plaintiff, Adam Thomas, un-
> [fol. 1b] less the Plaintiff shall within twenty (20) days file an Amended Complaint so as to state a Cause of Action in Conformity to the foregoing Opinion".

Aug. 29, 1951, Praecipe for entry of Judgment in above action in favor of Defendant and against Plaintiff in accordance with Opinion and Order of Court filed, and Judgment entered in favor of Defendant and against Plaintiff.

Aug. 29, 1951, Judgment is hereby entered in favor of Defendant and against Plaintiff.

Oct. 9, 1951, Certiorari from Supreme Court filed.

Nov. 20, 1951, Statement of Question Involved filed.

Dec. 15, 1951, Certificate of Judge as to Amount in Controversy filed.

[fol. 2] IN THE COURT OF COMMON PLEAS

COMPLAINT—Filed May 13, 1947

And Now, to wit, this 18th day of November, 1950, comes the Plaintiff above and by his attorneys, Luria & Still, Esqs., and Henry C. Kessler, Jr., Esq., of the York County

(Pennsylvania) Bar and Mark E. Garber, Esq. of the Cumberland County (Pennsylvania) Bar, brings this action in assumpsit of which the following is his amended complaint:

1

Plaintiff is an individual residing at 353 North 17th Street, Camp Hill, Cumberland County, Pennsylvania.

2

Defendant is a partnership engaged in the stone quarry business and having its principal place of business at R. D. No. 1, Camp Hill, Cumberland County, Pennsylvania.

3

Defendant engaged Plaintiff as an employee under an oral contract of employment, said employment commencing prior to May 13, 1941, the date from which claim is made, [fol. 3] and continuing to date. During this period, Plaintiff has been regularly and continuously employed in the business of the Defendant, by virtue of an oral contract of employment, performing duties in connection with the normal and usual business of said Defendant and under its direction.

4

At the time of the cause of action herein set forth, to wit, that period between May 11, 1941 and April 14, 1945, Defendant Company was engaged in Interstate Commerce within the meaning of the Fair Labor Standards Act of 1938, 52 Stat. 1060, being an Act of the Congress of the United States, as well as the several decisions of the Supreme Court of the United States interpreting said Act of Congress, in that it was engaged in the usual course of its regular business in manufacturing, processing and delivering material used in carrying on the flow of interstate transportation, communication, and commerce; and the Plaintiff during the period aforesaid was employed by Defendant in its operation of a quarry wherein he, the said, Plaintiff, labored for Defendant in producing, processing, weighing and mixing sand, stones and cement, and loading trucks containing concrete, and giving directions to

company truck drivers as to the place of delivery daily of truck loads of sand and cement (concrete) to various customers of the said company, being namely, the contractor engaged in laying and building the Pennsylvania Turnpike, a highway which handles the flow of commerce [fol. 4] between the states; to the Harrisburg Municipal Airport for the building and erection of landing fields to accommodate the flow of airplanes in Interstate Commerce; to the Pennsylvania Railroad for use in the repair and maintenance of its roadbeds for the operation of its interstate passenger and freight trains; to the United States Army Depot; the U. S. Navy Depot; and other similar projects which aided the flow of commerce, as will be proven by Plaintiff when he has his day in Court. *Specifically the Plaintiff each and every single day during the specified period was given orders received by the company for concrete.* Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, *said customers daily including*, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, as aforesaid, railroads, airports and various other interstate channels. Proof of all that is herein pleaded will be furnished on trial when Plaintiff has his day in Court.

5

As a result of said Interstate Commerce engaged in by Defendant and by Defendant's employee, the within Plain- [fol. 5] tiff, the provisions of the aforesaid Act of Congress are applicable, and the decisions of the Supreme Court of the United States interpreting the Act of Congress, and the meaning of "Interstate Commerce" are applicable and constitute the "law of this case".

6

For and during the aforementioned period, Plaintiff was not paid for overtime hours of employment as required by the said Act of Congress, as evidenced by the Plaintiff's Exhibit "A" attached hereto and made a part hereof, said overtime payments not commencing until April 15, 1945.

7

From May 13, 1941 to October 13, 1941, Plaintiff was paid the sum of $.50 per hour irrespective of the number of hours worked by him, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

8

From November 1, 1941 to March 31, 1942, Plaintiff received $.55 per hour, irrespective of the number of hours worked by him, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

9

From April 1, 1942 to June 15, 1942, Plaintiff received $.60 per hour irrespective of the total number of hours worked, with no overtime payment being paid to Plaintiff [fol. 6] for hours worked by Plaintiff over and above that permitted by law.

10

From June 16, 1942 to September 30, 1942, Plaintiff was paid $.65 per hour irrespective of the total hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

11

From October 1, 1942 to January 31, 1943, Plaintiff received $.70 per hour, irrespective of the number of hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

12

From February 1, 1943 to April 15, 1945, Plaintiff received $.75 per hour, irrespective of the number of hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

13

Commencing on or about April 15, 1945, the Defendant did begin to pay Plaintiff for his overtime in accordance with the applicable Act of Congress, more specifically referred to hereinafter. Plaintiff is therefore justly entitled to payment for overtime worked by him from May 13, 1941 to April 15, 1945, for which no payment was made. At- [fol. 7] tached hereto, marked Exhibit "A" and made a part hereof is the schedule of hours worked by Plaintiff per week, his statement of the hours of overtime per week and the amount due and owing to him each week by reason of Defendant's failure to pay him for said overtime, and the total thus due and owing to Plaintiff in accordance with the aforementioned Act of Congress.

14

In thus paying to the Plaintiff only the regular rate of pay for the total number of hours worked, and failing to pay for overtime, Defendant directly violated Section 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 206, 207 and 216, being an Act of the Congress of the United States.

15

The Act of Congress herein referred to as well as the decisions of the United States Supreme Court interpreting the same are matters of which the Court will take judicial notice in determining the applicability of such legislation to the parties hereto.

16

Wherefore the Court of Common Pleas of Cumberland County, Pennsylvania, by virtue of the facts herein set forth, has jurisdiction over the subject matter of Plaintiff's cause of action as well as of all parties in interest.

Wherefore, Plaintiff claims of the Defendant the sum of two thousand three hundred seven dollars and fifty-six [fols. 8-9] cents ($2,307.56) being unpaid minimum wages and unpaid overtime wages as well as an equal sum as liquidated damages, as provided by Section 16 (b) of the said Act of Congress, and the further sum of $3,000.00 as reasonable counsel fees, pursuant also to the provisions of Section 16 (b) of the said Act of Congress, making a total sum of seven thousand six hundred fifteen dollars and twelve cents ($7,615.12) now due and owing to the Plaintiff.

Demand having been made for payment and the same having been refused, Plaintiff brings his suit.

(S.) Henry C. Kessler, Jr., Luria & Still, by William A. Luria, Mark E. Garber, Attorneys for Plaintiff.

Duly sworn to by Adam Thomas. Jurat omitted in printing.

[fol. 10]

EXHIBIT "A" TO COMPLAINT

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
May 11 to May 17 (1941)	74½	$ .50	34½	$8.63
May 18 to May 24	73½	.50	33½	8.38
May 25 to May 31	68½	.50	28½	7.13
June 1 to June 7	71	.50	31	7.75
June 8 to June 14	80	.50	40	10.00
June 15 to June 21	74	.50	34	8.50
June 22 to June 28	70½	.50	30½	7.63
June 29 to July 5	57	.50	17	4.25
July 6 to July 12	76½	.50	36½	9.13
July 13 to July 19	75	.50	35	8.75
July 20 to July 26	75	.50	35	8.75
July 27 to Aug. 2	72	.50	32	8.00
Aug. 3 to Aug. 9	71	.50	31	7.75
Aug. 10 to Aug. 16	70½	.50	30½	7.63
Aug. 17 to Aug. 23	72½	.50	32½	8.13
Aug. 24 to Aug. 30	72½	.50	32½	8.13
Aug. 31 to Sept. 6	72½	.50	32½	8.13
Sept. 7 to Sept. 13	70½	.50	30½	7.63
[fol. 11]				
Sept. 14 to Sept. 20	73½	.50	33½	8.38
Sept. 21 to Sept. 27	71½	.50	31½	7.88
Sept. 28 to Oct. 4	70½	.50	30½	7.63
Oct. 5 to Oct. 11	54¼	.50	14¼	3.56
Oct. 12 to Oct. 18	60¾	.50	20¾	5.19
Oct. 19 to Oct. 25	78½	.50	38½	9.63
Oct. 26 to Nov. 1	74	.50	34	8.50

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
Nov. 2 to Nov. 8	69½	.55	29½	8.11
Nov. 9 to Nov. 15	74	.55	34	9.35
Nov. 16 to Nov. 22	76	.55	36	9.90
Nov. 23 to Nov. 29	73	.55	33	9.08
Nov. 30 to Dec. 6	83	.55	43	11.83
Dec. 7 to Dec. 13	78½	.55	38½	10.59
Dec. 14 to Dec. 20	79	.55	39	10.73
Dec. 21 to Dec. 27	61	.55	21	5.78
Dec. 28 to Jan. 3 (1942)	76¼	.55	36¼	9.97
Jan. 4 to Jan. 10	75	.55	35	9.63
Jan. 11 to Jan. 17	72½	.55	32½	8.94
Jan. 18 to Jan. 24	73	.55	33	9.08
Jan. 25 to Jan. 31	65½	.55	25½	7.01
Feb. 1 to Feb. 7	61	.55	21	5.78
[fol. 12]				
Feb. 8 to Feb. 14	62½	.55	22½	6.19
Feb. 15 to Feb. 21	76	.55	36	9.90
Feb. 22 to Feb. 28	78½	.55	38½	10.59
Mar. 1 to Mar. 7	80	.55	40	11.00
Mar. 8 to Mar. 14	78	.55	38	10.45
Mar. 15 to Mar. 21	74½	.55	34½	9.49
Mar. 22 to Mar. 28	74	.55	34	9.35
Mar. 29 to Apr. 4	73	.55	33	9.08
Apr. 5 to Apr. 11	66½	.55	26½	7.95
Apr. 12 to Apr. 18	74	.55	34	10.20
Apr. 19 to Apr. 25	75	.55	35	10.50
Apr. 26 to May 2	74	.55	34	10.20
May 3 to May 9	67	.55	27	8.10
May 10 to May 16	73	.55	33	9.90
May 17 to May 23	75½	.55	35½	10.65
May 24 to May 30 (1942)	72½	.55	32½	9.75
May 31 to June 6	71½	.55	31½	9.45
June 7 to June 13	73½	.55	33½	10.05
June 14 to June 20	81½	.65	41½	13.49
June 21 to June 27	71½	.65	31½	10.24
June 28 to July 4	75½	.65	35½	11.54
[fol. 13]				
July 5 to July 11	85	.65	45	14.63
July 12 to July 18	90½	.65	50½	16.41
July 19 to July 25	94½	.65	54½	17.71
July 26 to Aug. 1	83½	.65	43½	14.14
Aug. 2 to Aug. 8	78½	.65	38½	12.51
Aug. 9 to Aug. 15	71	.65	31	10.08
Aug. 16 to Aug. 22	64½	.65	24½	7.96
Aug. 23 to Aug. 29	55½	.65	15½	5.04
Aug. 30 to Sept. 5	81½	.65	41½	13.49
Sept. 6 to Sept. 12	76	.65	36	11.70
Sept. 13 to Sept. 19	87	.65	47	15.28
Sept. 20 to Sept. 26	77	.65	37	12.03
Sept. 27 to Oct. 3	79	.65	39	12.68
Oct. 4 to Oct. 10	67½	.70	27½	9.13
Oct. 11 to Oct. 17	72½	.70	32½	11.38
Oct. 18 to Oct. 24	72	.70	32	11.20
Oct. 25 to Oct. 31	62	.70	22	7.70
Nov. 1 to Nov. 7	74½	.70	34½	12.08

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hr. Overtime	Amt. Owing
Nov. 8 to Nov. 14	74	.70	34	11.90
Nov. 15 to Nov. 21	85½	.70	45½	15.93
Nov. 22 to Nov. 28	81½	.70	41½	14.53
[fol. 14]				
Nov. 29 to Dec. 5	79½	.70	39½	13.83
Dec. 6 to Dec. 12	78½	.70	38½	13.48
Dec. 13 to Dec. 19	74	.70	34	11.90
Dec. 20 to Dec. 26	61	.70	21	7.35
Dec. 27 to Jan. 2 (1943)	74½	.70	34½	12.08
Jan. 3 to Jan. 9	75	.70	35	12.25
Jan. 10 to Jan. 16	76½	.70	36½	12.78
Jan. 17 to Jan. 23	72	.70	32	11.20
Jan. 24 to Jan. 30	74	.70	34	11.90
Jan. 31 to Feb. 6	86	.75	46	17.25
Feb. 7 to Feb. 13	67	.75	27	10.13
Feb. 14 to Feb. 20	71½	.75	31½	11.81
Feb. 21 to Feb. 27	75½	.75	35½	13.31
Feb. 28 to Mar. 6	70½	.75	30½	11.44
Mar. 7 to Mar. 13	74½	.75	34½	12.94
Mar. 14 to Mar. 20	76	.75	36	13.50
Mar. 21 to Mar. 27	73½	.75	33½	12.56
Mar. 28 to Apr. 3	77	.75	37	13.88
Apr. 4 to Apr. 10	72½	.75	32½	12.19
Apr. 11 to Apr. 17	83	.75	43	16.13
Apr. 18 to Apr. 24	73	.75	33	12.38
[fol. 15]				
Apr. 25 to May 1	71½	.75	31½	11.81
May 2 to May 8	71½	.75	31½	11.81
May 9 to May 15	78	.75	38	14.25
May 16 to May 22	73½	.75	33½	12.56
May 23 to May 29	77½	.75	37½	14.06
May 30 to June 5	70	.75	30	11.25
June 6 to June 12	72	.25	32	12.00
June 13 to June 19	74	.75	34	12.75
June 20 to June 26 (1943)	74	.75	34	12.75
June 27 to July 3	72½	.75	32½	12.19
July 4 to July 10	74	.75	34	12.75
July 11 to July 17	62½	.75	22½	8.44
July 18 to July 24	78	.75	38	14.25
July 25 to July 31	79½	.75	39½	14.81
Aug. 1 to Aug. 7	72	.75	32	12.00
Aug. 8 to Aug. 14	61	.75	21	7.88
Aug. 15 to Aug. 21	69½	.75	29½	11.06
Aug. 22 to Aug. 28	69	.75	29	10.88
Aug. 29 to Sept. 4	83½	.75	43½	16.31
Sept. 5 to Sept. 11	63	.75	23	8.63
Sept. 12 to Sept. 18	70	.75	30	11.25
[fol. 16]				
Sept. 19 to Sept. 25	69½	.75	29½	11.06
Sept. 26 to Oct. 2	74½	.75	34½	12.94
Oct. 3 to Oct. 9	75	.75	35	13.13.
Oct. 10 to Oct. 16	67½	.75	27½	10.31
Oct. 17 to Oct. 23	65	.75	25	9.38
Oct. 24 to Oct. 30	62½	.75	22½	8.44

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
Oct. 31 to Nov. 6	64	.75	24	9.00
Nov. 7 to Nov. 13	76	.75	36	13.50
Nov. 14 to Nov. 20	67	.75	27	10.13
Nov. 21 to Nov. 27	72	.75	32	12.00
Nov. 28 to Dec. 4	75	.75	35	13.13
Dec. 5 to Dec. 11	67	.75	27	10.13
Dec. 12 to Dec. 18	76½	.75	36½	13.69
Dec. 19 to Dec. 25	64	.75	24	9.00
Dec. 26 to Jan. 1 (1944)	66½	.75	26½	9.94
Jan. 2 to Jan. 8	74½	.75	34½	12.94
Jan. 9 to Jan. 15	76½	.75	36½	13.69
Jan. 16 to Jan. 22	77	.75	37	13.88
Jan. 23 to Jan. 29	72	.75	32	12.00
Jan. 30 to Feb. 5	71	.75	31	11.63
Feb. 6 to Feb. 12	78½	.75	38½	14.44
[fol. 17]				
Feb. 13 to Feb. 19	65	.75	25	9.38
Feb. 20 to Feb. 26	82	.75	42	15.75
Feb. 27 to Mar. 4	77½	.75	37½	14.06
Mar. 5 to Mar. 11	69	.75	29	10.88
Mar. 12 to Mar. 18	68	.75	28	10.50
Mar. 19 to Mar. 25	87	.75	47	17.63
Mar. 26 to Apr. 1	75½	.75	35½	13.31
Apr. 2 to Apr. 8	77	.75	37	13.88
Apr. 9 to Apr. 15	80	.75	40	15.00
Apr. 16 to Apr. 22	73	.75	33	12.38
Apr. 23 to Apr. 29	73½	.75	33½	12.56
Apr. 30 to May 6	68	.75	28	10.50
May 7 to May 13	72	.75	32	12.00
May 14 to May 20	86½	.75	46½	17.44
May 21 to May 27	81	.75	41	15.38
May 28 to June 3	75	.75	35	13.13
June 4 to June 10	74	.75	34	12.75
June 11 to June 17	87½	.75	47½	17.81
June 18 to June 24	74½	.75	34½	12.08
June 25 to July 1	80	.75	40	15.00
July 2 to July 8 (1944)	69	.75	29	10.88
[fol. 18]				
July 9 to July 15	82	.75	42	15.75
July 16 to July 22	73½	.75	33½	12.56
July 23 to July 29	62½	.75	22½	8.44
July 30 to Aug. 5	79½	.75	39½	14.81
Aug. 6 to Aug. 12	73	.75	33	12.38
Aug. 13 to Aug. 19	72½	.75	32½	12.19
Aug. 20 to Aug. 26	74	.75	34	12.75
Aug. 27 to Sept. 2	79	.75	39	14.63
Sept. 3 to Sept. 9	71½	.75	31½	11.81
Sept. 10 to Sept. 16	69	.75	29	10.88
Sept. 17 to Sept. 23	70⅓	.75	30½	11.44
Sept. 24 to Sept. 30	69	.75	29	10.88
Oct. 1 to Oct. 7	71	.75	31	11.63
Oct. 8 to Oct. 14	70½	.75	30½	11.44
Oct. 15 to Oct. 21	70½	.75	30½	11.44
Oct. 22 to Oct. 28	69½	.75	29½	11.06
Oct. 29 to Nov. 4	59½	.75	19½	7.31

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt Owing
Nov. 5 to Nov. 11	70	.75	30	11.25
Nov. 12 to Nov. 18	75	.75	35	13.13
Nov. 19 to Nov. 25	63	.75	23	8.63
Nov. 26 to Dec. 2	69½	.75	29½	11.06
[fol. 19]				
Dec. 3 to Dec. 9	78½	.75	38½	14.44
Dec. 10 to Dec. 16	59½	.75	19½	7.31
Dec. 17 to Dec. 23	80½	.75	40½	15.19
Dec. 24 to Dec. 30	75	.75	35	13.13
Dec. 31 to Jan. 6 (1945)	72½	.75	32½	12.19
Jan. 7 to Jan. 13	70	.75	30	11.25
Jan. 14 to Jan. 20	78	.75	38	14.25
Jan. 21 to Jan. 27	69½	.75	29½	11.06
Jan. 28 to Feb. 3	71	.75	31	11.63
Feb. 4 to Feb. 10	76	.75	36	13.50
Feb. 11 to Feb. 17	79	.75	39	14.63
Feb. 18 to Feb. 24	71	.75	31	11.63
Feb. 25 to Mar. 3	77½	.75	37½	14.06
Mar. 4 to Mar. 10	76½	.75	36½	13.69
Mar. 11 to Mar. 17	74	.75	34	12.75
Mar. 18 to Mar. 24	68	.75	28	10.50
Mar. 25 to Mar. 31	63½	.75	23½	8.81
Apr. 1 to Apr. 7	67½	.75	27½	10.31
Apr. 8 to Apr. 14	68½	.75	28½	10.69
Total				$2307.56

[fol. 20] IN THE COURT OF COMMON PLEAS

PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT IN ASSUMPSIT—Filed June 25, 1947

To the Honorable, the President Judge of the said Court:

Defendant, Hempt Brothers, by its attorneys, Myers and Myers and McNees, Wallace & Nurick, comes and files these Preliminary Objections to the amended Complaint filed on November 21, 1950, in the above-entitled matter, moves the court for judgment and hereby assigns the following reasons therefor:

1. The facts alleged in the amended complaint, in addition to affirmatively disclosing that plaintiff was an off-the-road employee at a quarry beyond the scope of the Fair Labor Standards Act of 1938 as interpreted in numerous decisions, fails to set forth facts vesting this court with

jurisdiction or rendering applicable at any time the Fair Labor Standards Act of 1938.

2. The amended complaint, while itemizing plaintiff's compensation by work weeks, fails to set forth specifically in what weeks, or months or years, the trucks for which plaintiff claims he produced sand, stone and cement, delivered concrete to any contractor building the Pennsylvania Turnpike, to the Harrisburg Municipal Airport, to the Pennsylvania Railroad, or to the United States Army or Navy. Plaintiff also fails to set forth as to any specific week where one of these consignees was involved the [fol. 21] identity of the customer or the nature of the use, whether new construction or otherwise unrelated to interstate commerce, to which the concrete was put. With so general a pleading the court could not determine for what weeks, if any, it has jurisdiction, nor determine in what amount any judgment for plaintiff might appropriately be entered.

3. For the purpose of informing defendant of the bases of plaintiff's claim, defining the issues, and limiting the testimony to be produced, plaintiff should set forth, but the amended complaint fails to set forth, the uses to which the concrete, for which plaintiff claims he helped produce sand, stones and cement at defendant's quarry, was put. So far as plaintiff has referred in Paragraph 4 of the amended complaint to "building" it affirmatively appears that the concrete for customers of defendant, such as the unnamed Turnpike contractor and the Harrisburg Municipal Airport, was used in new construction to which the Act has not application.

Wherefore, defendant prays that plaintiff be ordered to make his amended complaint more specific and defendant further demands that judgment be entered in favor of the defendant and against the plaintiff in the above-captioned matter.

Myers and Myers. By Robert L. Myers, Jr. McNees, Wallace & Nurick. By James H. Booser.

[fol. 22] IN THE COURT OF COMMON PLEAS

OPINION AND ORDER OF COURT—March 31, 1948

The Plaintiff, Thomas, filed this action in assumpsit against the defendant to recover compensation for overtime wages, liquidated damages and counsel fees pursuant to Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 1069, 29 U.S.C.A., Sections 207 and 216. The Plaintiff seeks to recover compensation for the period beginning May 11, 1941 and ending April 14, 1945, after which period the defendant began to pay the plaintiff one and one-half times the regular hourly rate for any hours in excess of forty in any work week.

The matter now before the court is a consideration of preliminary objections to the plaintiff's amended complaint. For the purpose of brevity we shall refer to the amended complaint simply as the complaint. Two prior opinions have been filed in this case concerning other phases of this litigation which are reported in 62 D. & C. 618 and 74 D. & C. 213.

The first objection to the amended complaint is in the nature of a demurrer.

In the complaint the plaintiff avers that the defendant is a partnership engaged in the stone quarry business, [fol. 23] having its principal place of business at Camp Hill, R. D. No. 1, Cumberland County, Pennsylvania. In paragraph 4 of the complaint the plaintiff avers inter alia as follows: "* * * Plaintiff during the period aforesaid was employed by Defendant in its operation of a quarry wherein he, the said Plaintiff, labored for Defendant in producing, processing, weighing and mixing sand, stones and cement, and loading trucks containing concrete, and giving directions to company truck drivers as to the place of delivery daily of truck loads of sand and cement (concrete) to various customers of the said company, being namely, the contractor engaged in laying and building the Pennsylvania Turnpike, a highway which handles the flow of commerce between the states; to the Harrisburg Municipal Airport, for the building and erection of landing fields to accommodate the flow of airplanes in Interstate Commerce; to the Pennsylvania Railroad for use in the repair and main-

tenance of its roadbeds for the operation of its interstate passenger and freight trains; to the United States Army Depot; the U. S. Navy Depot; and other similar projects which aided the flow of commerce, * * * Specifically the Plaintiff each and every single day during the specified period was given orders received by the company for concrete. Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer oper- [fol. 24] ator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, said customers daily including, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, as aforesaid, railroads, airports and various other interstate channels. * * *"

The averments of the complaint as to the nature of the plaintiff's exact duties are set forth in full since as we said in a previous opinion in this case, 62 D. & C. 618 at 624. "The Federal Courts have held repeatedly that the coverage of the Fair Labor Standards Act depends upon the character of the activities of a particular employee rather than upon the nature of the business of the employer. * * * "

In support of his demurrer the defendant contends that the plaintiff's complaint affirmatively discloses that the plaintiff was an off-the-road employee, at a quarry, and therefore was beyond the scope of the Fair Labor Standards Act of 1938, and that the defendant is therefore entitled to a judgment on the pleadings. A consideration of the decisions interpreting the Act leads to the conclusion that this position is well taken.

In McLeod v. Threlkeld, 319 U. S. 491; 63 S. Ct. 1248, the Supreme Court of the United States held that a cook and caretaker for maintenance-of-way men on a railroad was not engaged in commerce under the Act. Coverage of [fol. 25] the Act was limited to employees actually engaged in working upon the interstate transportation facilities. It had previously been decided that on-the-road employees were covered by the Act in Overstreet v. North Shore Cor-

poration, 318 U. S. 125; 63 S. Ct. 494, in which it was held that employees operating and maintaining privately-owned toll roads and bridges over navigable waterways were "engaged in commerce".

The decision in the instant case is directly controlled by the case of Shroeder Company, Inc. v. Clifton, 153 F. 2d 385. In that case one group of employees was engaged at a quarry in mining, producing, and processing stone used for a gravel cushion and riprap in the construction of relocated portions of a railroad and a highway. The court held that the Fair Labor Standards Act was inapplicable to these employees. The court said, beginning at page 389: "The work of the employees in question, either separate and distinct or as an integral part of the integrated effort, *did not have for its purpose the production or manufacture of any goods or commodity for movement in interstate commerce.* Their work was not directed to the production or manufacture of anything for commerce, within the meaning of the Act. They were engaged in local business * * *

"* * * If Congress had intended to extend the coverage of the Act *to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in com-* [fol. 26] *merce, it certainly would have employed apt words to express the intention.* We fail to find any thing in the language of the Act or its legislative history which lends support to the view that Congress purposed to bring workmen of that class within the coverage.

"* * * Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production and processing of gravel cushion and riprap for use in the construction of relocated portions of the railroad and the highway are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act." (Emphasis supplied).

The Shroeder case was followed in the case of McComb v. Trimmer et al., 85 F. Supp. 565 (1949) in which it was held that employees engaged in the production of crushed stone, shale, gravel and sand at a place of business in New Jersey were not covered by the act even though the materials were used in the maintenance, repair and recon-

struction of highways carrying interstate trade and commerce.

The complaint in this case does not state that any of the materials handled by Thomas were delivered outside of this state; on the other hand we take judicial notice of the fact that all of the customers referred to in the complaint are situated within this state. If the facts are otherwise, such may be shown in an amended complaint, permission for the filing of which will be granted. We are disposing of [fol. 27] the matter in this manner, rather than directing an amendment to the complaint in limine so that further delay in the conclusion of this extended litigation may be avoided.

The averments of the complaint clearly indicate that the plaintiff is an off-the-road employee and that none of the goods handled by him are produced for interstate commerce. He is, therefore, not within the coverage of the Fair Labor Standards Act.

The defendant's preliminary objection in the nature of a demurrer must be sustained. It is, therefore, unnecessary to discuss the matters covered in the motion for a more specific statement.

Although plaintiff's counsel indicated that the plaintiff's case must rise or fall on the averments of paragraph 4 of the amended complaint, the usual opportunity will be granted to further amend the complaint so as to state a good cause of action.

And now, August 8, 1951, the motion of the defendant in the nature of a demurrer is granted, and judgment is entered in favor of the defendant, Hempt Brothers, and against the plaintiff, Adam Thomas, unless the plaintiff shall within twenty (20) days file an amended complaint so as to state a cause of action in conformity to the foregoing opinion.

By the Court, (S.) Dale F. Shughart, P. J.

[fol. 27a] IN THE SUPREME COURT OF PENNSYLVANIA, JANUARY TERM, 1952

DOCKET ENTRIES

66

Mark E. Garber, Henry C. Kessler, Jr., Robert L. Myers, Jr., Myers & Myers, 10-11-51.

ADAM THOMAS, Plaintiff,

vs.

HEMPT BROTHERS, Defendant

Appeal of plaintiff, No. 6, September Term, 1947, from the judgment.

Appeal from Court of Common Pleas of the County of Cumberland, Filed October 3, 1951. Eo. die certiorari exit. Retble. second Monday of April, 1952.

March 27, 1952. Record returned and filed. April 17, 1952. Argued. June 24, 1952. Judgment affirmed. Opinion by Jones, J., Dissenting opinion by Musmanno, J.

July 7, 1952. Remittitur exit and with record sent to: Prothonotary, Cumberland County.

July 9, 1952. Acknowledgment of record, remittitur, etc., received and filed.

July 11, 1952. Petition for leave to file petition for reargument filed. Henry C. Kessler, Jr.

August 15, 1952. Petition denied. Per Curiam.

September 19, 1952. Petition for transcript of record filed. Henry C. Kessler, Jr.

[fol. 28] IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

ADAM THOMAS, Appellant,

v.

HEMPT BROTHERS

OPINION OF THE COURT—June 24, 1952

JONES, J.:

The plaintiff, an employee of the defendant partnership, filed his complaint in the Court of Common Pleas of Cumberland County seeking to recover from his employer overtime wages for a specified period, liquidated damages and counsel fees under the provisions of Secs. 6, 7 and 16 (b) of the Fair Labor Standards Act of 1938 as amended.[1]

After preliminary objections to the original complaint and also to the first amended complaint had been sustained (see 62 D. & C. 618, 626, and 74 D. & C. 213, 218), a second amended complaint was filed. Preliminary objections to that complaint were also sustained and the judgment for the defendant from which the plaintiff has appealed was automatically entered after the plaintiff had failed to file a further amended complaint within twenty days as authorized by the court's order conditionally entering the judgment for the defendant.

The complaint averred that the defendant, Hempt Brothers, is a partnership engaged in the stone quarry business with its principal place of business in Camp Hill, Pa.; and that, during the period of time covered by the complaint, the plaintiff worked for the defendant "in producing, processing, weighing and mixing sand, stones and cement and loading trucks containing concrete and [in] giving directions to [defendant's] truck drivers as to the place of delivery daily of truckloads of sand and cement [fol. 29] (concrete) to various customers" of the defendant. The customers were the Pennsylvania Turnpike, the Harris-

[1] Act of Congress of June 25, 1938, 52 Stat. 1060, as amended October 29, 1941, 55 Stat. 756, 29 U. S. C. A., §§ 206, 207, 216 (b).

burg Municipal Airport; the Pennsylvania Railroad Company, the U. S. Army Depot and the U. S. Navy Depot, all of which are located within the State of Pennsylvania. The complaint further averred that, during the specified period, orders received by the company for concrete were communicated each day to the plaintiff who secured the proper number of trucks to haul the requirements of each order and was in charge of the mixing process whereby various types of concrete were processed; that he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and that, when this process was completed, he filled and loaded the trucks and dispatched them to the indicated customers. The complaint does not contain any averment that the materials processed, handled or dispatched by the plaintiff either originated or were delivered outside of Pennsylvania; however, it is readily conceded that the defendant's customers maintained facilities for handling persons or property moving in interstate commerce.

The question involved is whether the complaint states a cause of action within the provisions of the Fair Labor Standards Act. The answer depends upon whether the plaintiff, in the performance of the duties of his employment, was engaged "in commerce or in the production of goods for commerce" as contemplated by Sec. 7 (a) of the Act (29 U. S. C. A. § 207 (a) Pkt. Part). "Commerce" is defined by Sec. 3 (b) of the Act (29 U. S. C. A. § 203 (b) Pkt. Part) as meaning "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

In considering whether an employee is within the coverage of the Act, it is essential to keep in mind that it is the nature of the *employee's* activities in the course of his work and *not* the character of his employer's business that de- [fol. 30] termines whether the employee is engaged in commerce or in the production of goods for commerce. In *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571, the Supreme Court said that "The fact that all of [the employer's] business is not shown to have an interstate character is not important. *The applicability of the Act is dependent on the character of the employees' work*" (Emphasis supplied). Or, as stated in *McLeod v. Threlkeld*, 319

U. S. 491, 497,—"It is not important whether the employer * * * is engaged in interstate commerce. It is the work of the employee which is decisive."

There is, however, no hard and fast rule for determining when an employee is engaged in commerce or in the production of goods for commerce. In *A. B. Kirschbaum Co. v. Walling, Administrator, etc.*, 316 U. S. 517, 520, where the extent of the coverage afforded by the Act was under consideration, it was recognized that "Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States." Our task is to deduce from the federal decisions in specific cases, arising under the Act, criteria for determining whether on the admitted facts of this case the plaintiff was engaged either in commerce or in the production of goods for commerce.

In *Overstreet v. North Shore Corporation*, 318 U. S. 125, men engaged in maintaining or operating a toll road and drawbridge over a navigable waterway, which together constituted a medium for the interstate movement of goods and persons, were held to be "engaged in commerce." It was there said (p. 130) that "Those persons who are engaged in maintaining and repairing such [interstate] facilities should be considered as 'engaged in commerce' * * * because without their services these instrumentalities would not be open to the passage of goods and persons across state lines." A little later in *McLeod v. Threlkeld*, supra, [fol. 31] it was stated for the Supreme Court (p. 497) that "The test under this [Fair Labor Standards] act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." That this was an intended limitation of the broader language used in the *Overstreet* case, supra, is inferrable from the fact of the dissent in the *McLeod* case by Mr. Justice Murphy who had written the majority opinion in the *Overstreet* case and the further fact that the two dissenters in the earlier (*Overstreet*) case were of the majority in the *McLeod* case. In that case the court

refused to extend "the conception of 'in commerce' * * * beyond the employees engaged in actual work upon the transportation facilities" and, accordingly, held that a cook who furnished meals to men engaged in maintaining an interstate railroad was not "engaged in commerce".

In keeping with the foregoing decisions of the Supreme Court, the Court of Appeals for the Tenth Circuit, in a well considered opinion, held that workers in a quarry who excavated and processed stone for local use on a highway and a railroad, both interstate instrumentalities, were outside the Act for the reason that "In order to be engaged in commerce within the scope of the Act, the employee must be actually engaged in the movement of commerce or the service which he performs must be so closely related to it as to be for all practical purposes a part of it". *E. C. Schroeder Co., Inc.* v. *Clifton*, 153 F. 2d 385, 390 (C. A. 10), cert. den. 328 U. S. 858. For other federal cases holding that quarry workers employed in producing and processing stone and shale for local use on interstate highways are not within the Fair Labor Standards Act, see *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. C. N. J.) and *Walling* v. *Craig*, 53 F. Supp. 497 (D. C. Minn.).

It is further contended, however, that, even though manual workers in "off-the-road" activities, such as the cook in the *McLeod* case or the quarrymen in the *Schroeder*, [fol. 32] *Trimmer* and *Craig* cases, supra, are not engaged in commerce, the present plaintiff's supervisory duties in connection with the loading and dispatching of the trucks which delivered the concrete to the defendant's customers were of a sufficiently quasi-managerial nature as to engage him in commerce. We fail to see how he was any less an "off-the-road" worker. His supervisory duties did not actually connect him with the movement of commerce nor was the service which he thus performed so closely related to commerce as to be, for all practical purposes, a part of it (*Schroeder* v. *Clifton*, supra). It follows, therefore, that, under the facts pleaded, the plaintiff was not engaged in commerce within the intendment of the Fair Labor Standards Act.

That brings us to the remaining question whether the plaintiff was engaged in the production of goods for commerce. A material distinction between being engaged in

commerce and being engaged in the production of goods for commerce is recognized by the cases: see *Overstreet* v. *North Shore Corporation*, supra; *McLeod* v. *Threlkeld*, supra; *E. C. Schroeder Co., Inc.* v. *Clifton*, supra; *Walling* v. *Sondock*, 132 F. 2d 77, 78 (C. A. 5); and *Fleming* v. *Stillman*, 48 F. Supp. 609, 619 (D. C. M. D. Tenn.). The *Schroeder* case well exemplifies the differentiation. There, as we have already seen, the employees who quarried and prepared the rock for local use on a highway and on a railroad, both interstate instrumentalities, were not engaged "in commerce." Yet another group of similar employees who quarried some of the same kind of rock for use directly in the construction of a dike to prevent a nearby oil field from being inundated and ruined by the encroachment of water from a dam, then under construction, were held to be within the Act. The reason for the latter conclusion was that such employees' work contributed immediately to the continued flow of oil which, of itself, was an article of commerce. The court thus reasoned: "Quarrying the rock, processing it, and hauling some of it to the dyke constituted part of the integrated effort having for [fol. 33] its purpose the protection of the oil field from being flooded in order that production of oil and its movement in interstate commerce might continue. While bearing that close and immediate tie to the integrated effort designed to effectuate the continued production of oil and its movement in interstate commerce, the employees were *engaged in the production of goods for commerce* * * *" (Emphasis supplied).

In the present instance, the stone was quarried locally for local use. True enough, as a part of a concrete aggregate, the stone became imbedded in interstate transportational facilities, but it never moved in interstate commerce nor became a part of commerce. The fact that the workmen who applied the concrete to the maintenance of the interstate instrumentalities may have consequently been "in commerce" (see *Overstreet* v. *North Shore Corporation*, supra) did not constitute the "off-the-road" employees, who prepared and delivered the concrete, producers of goods for commerce. So concluding, we could leave the matter here were it not for a recent decision of the Court of Appeals for the Third Circuit (*Tobin* v. *Alstate Con-*

struction Company, — F.2d —, handed down April 9, 1952) which needs be considered.

In the *Alstate* case, supra, the defendant employer made, distributed and applied amesite, a bituminous product used in resurfacing roads. Some of the component materials came from outside the State, but all of the product was compounded, delivered and used within the State, about 85% of it being used in the maintenance and repair of interstate highways. The defendant employer conceded that those of its employees who applied the amesite to the highways were covered by the Act, being "engaged in commerce" on analogy to the service performed in *Overstreet v. North Shore Corporation*, supra. The defendant contended, however, that those of its employees who hauled the materials to the amesite plants, those who worked in the compounding plants and those who delivered the amesite from the plants to the defendant's various customers were not "engaged in [fol. 34] commerce" and, therefore, were not covered by the Act under the rulings in the *McLeod*, *Schroeder*, *Craig* and *Trimmer* cases, supra. The action in the *Alstate* case was by the Secretary of Labor for relief against alleged violations of the Act by the defendant with respect to the employees just indicated. The District Court, apparently being of the opinion that they also were engaged "in commerce," issued an injunction restraining the defendant from cognate violations of the Act.

The Court of Appeals, in affirming the decree in the *Alstate* case, supra, went considerably further than the District Court had gone and held that "* * * Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged 'in the production of goods for commerce.'" This decision not only conflicted directly with the ruling in the *Schroeder* case, with respect to "off-the-road" employees who locally produce and prepare materials for local use in the repair and maintenance of interstate instrumentalities, but it, at once, introduced an entirely new theory for bringing such employees within the coverage of the Act, namely, that they are engaged "in the production of goods for commerce." The way in which the learned court reached this conclusion was by reasoning that, inasmuch as *goods in commerce* would be hauled over the high-

ways which were repaired and maintained with materials furnished by the "off-the-road" employees, the latter were in an "occupation directly essential to the production" of *such* goods within the intent of Sec. 3 (j) of the Act. The vast number of purely local employments that would be made subject to the Act on the basis of the theory of the *Alstate* case is not difficult to imagine. It is readily conceivable that many, if not most, local activities are "necessary", at least in some remote degree, to the production of goods for commerce. Particularly pertinent becomes the caution voiced by the Court of Appeals for the Sixth Circuit, when construing the coverage of the Fair Labor Standards Act in *Chapman v. Home Ice Co. of Memphis*, 136 F. 2d 353, [fol. 35] 355 (one of the so-called "ice" cases),—"We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may, under 'The House That Jack Built'" tee-nie, lead to absurdity and end by ignoring all practical distinction between 'what is parochial and what is national.'"

When called upon to apply a federal statute, we necessarily give it the meaning which the highest federal judicial authority to pronounce upon it to date has ascribed to it; and, where courts of equal dignity have differed in their interpretations, we naturally accept the decision which to us reaches the more logical conclusion. Accordingly, we choose to follow the ruling of the *Schroeder* case with respect to the "off-the-road" employees of the independent contractor for reasons which we shall now express.

The difference which the opinion in the *Alstate* case attributes to the *Schroeder* case, wherein it states that the interstate instrumentalities in the latter case were "new construction", is apparent rather than real. Actually, the work in the *Schroeder* case was not "new construction" within the contemplation of that term as employed in the Act. It was but a relocation of existing arteries of interstate traffic (viz., a highway and a railroad) made necessary by the Federal Government's construction of the Denison Dam and Rese-voir. Thus, it was noted in the *Schroeder* case (p. 387) that "The relocated track has been connected with the existing track of the railroad company and has become a permanent part of it. The relocated portion of the highway when completed was or is to become a part of

the existing highway but it had not been completed at the time of the trial of this case." Certainly, the Court of Appeals, which decided the *Schroeder* case, did not regard "new construction" as being present nor was it assigned as a reason for excluding the particular employees from the coverage of the Act as it should have been, and no doubt would have been, had the work been "new" construction within the meaning of the Act: cf. *Kelly v. Ford, Bacon & [fol. 36] Davis, Inc.*, 162 F. 2d 555 (C.A. 3).

The *Alstate* opinion sought to distinguish the *Craig* case, supra, on the ground that it was decided prior to the Administrator's ruling of March 1945 that employees preparing local materials for local use by instrumentalities of commerce were producing goods for commerce. Incidentally, the *Schroeder* case was decided subsequent to the Administrator's ruling and in evident and authoritative disregard of it. In any event, the ruling was based upon the so-called "ice cases" which are plainly distinguishable. Yet, one of them (*Atlantic Co. v. Walling*, 131 F. 2d 518, C.A. 5) is cited in the *Alstate* opinion as authority for its ruling and two others (*Chapman v. Home Ice Co. of Memphis*, supra, and *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165, C.A. 4) are cited in a footnote. The "ice cases" were discriminatingly distinguished in the *Schroeder* case where Judge Bratton, speaking for the court, said (p. 389),—"Our attention is directed to the so-called ice cases [citing them]. In all of them, the ice company produced ice and sold it to a railroad company, an express company, or other like agency, for icing refrigerator cars, icing dining cars, icing shipments of less than car lots, or other similar purpose; and the major contention of the ice company was that since it sold the ice at the point of production to the transportation company, the production was local and therefore its employees were not within the coverage of the Act. That contention was rejected. But in wide difference from the facts here, it affirmatively appears in three of those cases and is fairly inferable in the fourth, that some of the ice actually moved across state lines before being consumed by use or otherwise, and that it was produced and sold with knowledge and intent that it would move in that manner. It is true that in *Atlantic Co. v. Walling*, supra, the court said in effect that the production of goods for commerce, within the meaning

of the Act, includes the production of goods for use by an instrumentality of interstate commerce as an essential part [fol. 37] of such commerce, even though the particular goods produced do not move in commerce. But the Act does not speak of the production of goods for commerce as distinguished from commerce itself." The foregoing distinction of the ice cases was quoted with approval and followed by the District Court for the District of New Jersey in the *Trimmer* case, supra.

It may be further observed that the portion of the ice so used for refrigeration which was consumed before it crossed the State line veritably entered into and became a part of the goods in commerce whose freshness and edibility it helped conserve. It was no doubt because of the expected physical relation or reaction between goods in commerce and the ice which refrigerates them that Sec. 1 (3) of the Interstate Commerce Act of 1887, as amended, 49 U.S.C.A. § 1(3), expressly declared, inter alia, that "transportation" (interstate) includes " * * * all services in connection with the * * * refrigeration or icing * * * of property transported." The very first of the "ice cases" (sub nom. *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 661, D.C.M.D. Ga.) specifically relied on this statutory declaration of the interstate character of the icing service of goods in commerce. The rationale of the "ice cases" is obviously not applicable to "off-the-road" employees who furnish materials locally for local use.

The case of *Roland Electrical Co. v. Walling*, 326 U. S. 657, which the *Alstate* opinion cites, is not presently in point. The employees who were there held to be under the Act made parts of electric motors which were used, inter alia, to manufacture goods for commerce. Consequently, under the definition of "produced" in Sec. 3 (j) of the Act, such employees were held to be in an occupation necessary to the production of goods for commerce. The relation was direct and immediate. In *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5), upon which the *Alstate* opinion also relies, the employees of an electrical company whose power was utilized in commerce and for the production of goods in commerce were likewise held, under the broad [fol. 38] definition of "produced" in Sec. 3 (j), to be in an

occupation necessary to the production of goods for commerce. There is no similarity between the facts of these cases and the "off-the-road" employees of the instant case.

Finally, we accept the inference drawn in the *Schroeder* case that "If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention." This view later received congressional confirmation: see Conference Report on Amendments to the Fair Labor Standards Act, 81st Cong., 1st Sess., 1949, U. S. Code Congressional Service, Vol. 2, pp. 2251, 2252-2254, where the *Schroeder* case was specifically treated with. The portion of the decision in that case which had extended the coverage of the Act to the quarry workers who prepared the rock for building the dike to protect the oil field from flooding was offset and avoided for the future by recommended amendment which became the Act of October 26, 1949, c. 736, Sec. 3 (j), 63 Stat. 911, 29 U.S.C.A. § 203 Pkt. Part.

Judgment affirmed.

Dissenting opinion by Musmanno, J.

[File endorsement omitted.]

[fol. 39] IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, JANUARY TERM, 1952

No. 66

ADAM THOMAS, Appellant,

v.

HEMPT BROTHERS

Appeal from Judgment of the Court of Common Pleas of Cumberland County at No. 6, September Term, 1947

DISSENTING OPINION

MUSMANNO, J.:

The fact that the defendant, since 1945, has paid the plaintiff overtime hours of employment in accordance with the provisions of the Fair Labor Standards Act is certainly evidence that the defendant believes that plaintiff's work is of an interstate character. And if it has been interstate since 1945, why should it not have been interstate from 1941 to 1945, when admittedly it was exactly the same type of work?

The averments in the plaintiff's statement of claim, if believed, clearly establish that he was engaged in handling material in interstate commerce. If the defendants challenged the accuracy and the veracity of his assertion, the Court could have taken testimony which would have proved or disproved his assertions. It is my opinion that entering judgment in favor of the defendant was error.

[File endorsement omitted.]

[fol. 40] IN THE SUPREME COURT OF PENNSYLVANIA

[Title omitted]

To the Prothonotary of the said Court:

PRAECIPE FOR TRANSCRIPT OF RECORD

Kindly prepare and certify to the Supreme Court of the United States the following papers:

a. Docket Entries,
b. The printed record as it appeared at the time the above case was argued in the Pennsylvania Supreme Court,
c. The majority opinion of the Supreme Court,
d. The dissenting opinion filed in the said case.

(S.) Henry C. Kessler, Jr., Attorney for Plaintiff.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 410

ADAM THOMAS, Petitioner,

vs.

HEMPT BROTHERS, a Partnership

ORDER ALLOWING CERTIORARI—Filed December 8, 1952

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1952

No. 410

ADAM THOMAS, *Petitioner,*

v.

HEMPT BROTHERS, a partnership, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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Supreme Court of the United States

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No. .....

ADAM THOMAS, *Petitioner,*

v.

HEMPT BROTHERS, a partnership, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to reverse the judgment of the Pennsylvania Supreme Court entered on June 24, 1952. (Petition for re-argument denied on August 22, 1952.)

OPINIONS BELOW

The trial court entered judgment in favor of the respondent on August 29, 1951, which is unreported. The Pennsylvania Supreme Court entered judgment in favor of the respondent on June 24, 1952, which judgment is

part of the record. It is this latter judgment which petitioner seeks to have set aside.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 24, 1952, and a rehearing denied August 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

SPECIFICATIONS OF ERROR AND QUESTIONS PRESENTED

Specification I

This litigation involves a legal question of first impression, thereby making desirable an early and definitive ruling by the Supreme Court.

Specification II

The Pennsylvania Supreme Court's refusal to follow the latest decision on the subject by the highest Federal Court.

Specification III

This litigation presents a question of vital public importance not only to the litigants involved but to all em-

ployers and employees engaged in both inter and intrastate activities, and to the Department of Labor of the United States of America in the enforcement of the provisions of the Fair Labor Standards Act of 1938 as amended.

Specification IV

A conflict exists between the decisions of the Pennsylvania Supreme Court (*Thomas* v. *Hempt Bros.* 371 PA. 383, 89 A(2) 776, this case), and the decisions of the United States Court of Appeals for the Third Circuit (*Tobin* v. *Alstate* 195 F(2), 577 decided April 9, 1952), and of the United States Court of Appeals for the Eighth Circuit (*Tobin* v. *Johnson* 11 WH cases 38, 22 Labor cases 67067, Supreme Court, No. 336, this term, not officially reported). The Supreme Court of the United States has not passed upon the legal questions involved herein.

Specification V

Petitioner's constitutional right to trial by jury was denied by the trial court.

STATEMENT OF THE CASE

Petitioner brought proceedings in the Court of Common Pleas of Cumberland County, Pennsylvania, to recover compensation for overtime wages, liquidated damages and counsel fees pursuant to Section 16B of the Fair Labor Standards Act of June 25, 1938, 29 U.S.C. Sections 206, 207, 216. Compensation for overtime is claimed for the period beginning May 11, 1941, and ending April 15, 1945, after which period the respondent began to pay petitioner

one and one-half times the regular hourly rate for any hours in excess of forty in any work week. After a series of interlocutory orders extending from a period in 1947 through 1951, the Court of first instance sustained a demurrer to the complaint filed by the petitioner. In sustaining the said demurrer the Court ruled as a matter of law that the petitioner, being an "off-the-road employee," was not within the coverage of the Fair Labor Standards Act.

Plaintiff was employed on the premises and engaged in giving directions to company truck drivers concerning the destination of materials manufactured by the employer to customers of the company engaged in interstate commerce; in receiving orders from the company office and keeping a record of the filling of said orders; directing and performing the function of mixing materials manufactured both in the proportions and quantities called for by the various customers. Specifically the plaintiff each and every single day during the specified period was given orders received by the company for concrete. Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, said customers daily including, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, railroads, airports and various other interstate channels.

The respondent took the position in the trial court and in the Supreme Court of Pennsylvania that inasmuch as the pleadings revealed affirmatively that the petitioner

was an "on the premises employee" that he was outside of the scope of the Fair Labor Standards Act. The question involved, therefore, is whether or not the complaint states a cause of action within the scope of the provisions of the Fair Labor Standards Act, supra. The Supreme Court of Pennsylvania ruled that an "off-the-road employee," even though engaged in the producing and handling of materials used to repair and maintain the channels of interstate commerce, is not engaged in the production of goods for commerce or engaged directly in interstate commerce. *Thomas* v. *Hempt Brothers* 371 PA. 383, 89A(2) 776 (1952).

REASONS FOR ALLOWANCE OF WRIT

The Pennsylvania Supreme Court in its decision refused to follow the decision of the United States Circuit Court of Appeals for the Third Circuit. The latter Court had ruled on this precise question April 9, 1952, (*Tobin* v. *Alstate* 195 F(2) 577) noting that the case was one of first impression. This Court has held on many occasions that in the absence of a decision by the highest court of the state, Federal Courts are bound by the decisions of the State intermediate appellate court in ascertaining the meaning of a State statute.

Six Companys v. *Field* 311 U.S. 169
West v. *A.T.&T. Co.* 311 U.S. 233
Stoner v. *New York Life Insurance Company* 311 U.S. 464

Similarly, the State Courts must follow the Federal Court's interpretation of Federal Statutes, otherwise there can be no uniformity in the application of Federal Statutes. *Dice* v. *Akron, Canton and Youngstown Railroad* 98 U.S. S.Ct. (L.Ed. Adv. Opn.) 285. The Pennsylvania

Supreme Court gave merely lip service to this principle in the instant case and then proceeded to ignore the reason for the rule and rejected the decision of the Third Circuit Court of Appeals in the *Alstate* case in favor of what it regarded as a sounder decision by the Tenth Circuit Court in the case of *E. C. Schroeder Co.* v. *Clifton* 153 Fed. (2) 385, Certiorari denied 328 U.S. 858, decided in 1946, and which was not controlling in the opinion of the Third Circuit Court of Appeals.

In taking this position the Pennsylvania Supreme Court violated the established principle that there should not be one "rule of law for litigants in the State Courts and another rule of law for litigants who bring the same question before the Federal Courts." This is exactly the situation which now prevails in Pennsylvania.

In the interest of uniformity, it is respectfully suggested that summary reversal of the decision of the Pennsylvania Supreme Court is the appropriate remedy, in this case. This is particularly so where as here the very excuse stated by the State Court for departing from the controlling Federal decision in its Circuit upon a Federal question of law conflicts with the *sole* Federal decision upon the question. The Supreme Court of Pennsylvania in rejecting the *Alstate* decision, rejected it as well as the statement in the *Alstate* case that "the precise question has never been passed upon by an Appellate Court." The Federal Court in the *Alstate* case held that the *Schroeder* case was not in point because it involved the production of rock for use in original construction which was not the legal question involved in either the *Alstate* case or the *Hempt Brothers* case (this case). Thus on the precise point of the existence of a conflict between Federal decisions (which the State Court gave as justification for rejecting the governing Federal appellate decision) the Pennsylvania Supreme Court re-

fused to follow and flatly rejected the *only* Federal appellate decision on point.

Subsequently, the Eighth Circuit Court in the case of *Tobin* v. *Johnson* 11 WH cases 38, 22 Labor cases 67067, Supreme Court, No. 336, this term, not officially reported passed upon the question ruled on in the *Hempt Brothers* case and the *Alstate case*. The opinion in the *Johnson* case refers to the *Schroeder* decision only to express its agreement with the conclusion reached in the *Alstate* case and it makes no mention of the *Hempt Brothers* decision. Thus no support for the Pennsylvania Supreme Court's decision is found in either of the two latest Federal decisions which have passed upon the legal question involved in these proceedings.

Another reason appears which would suggest that the instant case should be summarily remanded to the State Court without independant resolution of the issue. This is the absence in the *Hempt Brothers* case of any record presenting "a solid basis of findings based on litigation or a comprehensive statement of agreed facts." *Kennedy* v. *Silas Mason Company* 334 U.S. 249. In the instant case important issues are involved but here the record is less complete than in the *Kennedy* case. Here the Pennsylvania Court has sustained dismissal of the complaint on the pleadings and without trial or any factual presentation whatsoever. In the *Johnson* case, on the original appeal, the Circuit Court reversed the District Court, stating:

> "The issues tendered by the complaint are too important and far reaching to be decided upon an assumed state of facts gleaned from a pleading."
> See *McComb* v. *Johnson* 174 F (2) 833.

For these reasons it is respectfully submitted that this Court should summarily remand the record to the State Court and reverse the judgment of the Pennsylvania Supreme Court.

The precise issue presented by the instant case has never been passed upon by this Court. While this Court has never resolved the precise question involved in these proceedings, nevertheless, the language of the Supreme Court in several of its recent decisions arising under the Fair Labor Standards Act leads inevitably to the conclusion that coverage was intended for "off-the-road employees" such as herein involved.

In *Roland Electrical Company* v. *Walling* 326 U.S. 657 at page 663, this Court stated as follows:

> "This does not require the employee to be directly engaged in commerce among the several states. This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other articles or subjects of commerce of any character which are produced for trade, commerce or transportation among the several states."

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 410

IN THE

Supreme Court of the United States

October Term 1952

ADAM THOMAS, *Appellant*

vs.

HEMPT BROTHERS, A Partnership, *Appellee*.

BRIEF FOR APPELLANT

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Supreme Court of the United States

October Term 1952

No. 410

ADAM THOMAS, *Appellant*

vs.

HEMPT BROTHERS, A Partnership, *Appellee*

BRIEF FOR APPELLANT

STATEMENT OF THE QUESTION INVOLVED

1.

Whether an employee regularly engaged on the company's premises in preparing concrete mixes and materials for use in the repair, reconstruction, extension and maintenance of inter-state highways, roads, railroads, airports and government installations, dispatching the company's trucks loaded with the said mixes and materials to the site of the various inter-state projects, and

keeping records for company use of the mixture and materials compounded and dispatched by company trucks to the site where the physical work of applying said mixes and materials was being carried on by other employees of the same company, is engaged "in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

2.

Did the Court below err in concluding as a matter of law that "off-the-road" employees thusly engaged are not covered by the said Act?

STATEMENT OF THE CASE

The plaintiff-appellant, an employee of defendant-appellee filed his complaint in assumpsit in the Court of Common Pleas of Cumberland County, Pennsylvania, seeking to recover over-time wages, admittedly not paid him, for a specified time, liquidated damages and counsel fees under the provisions of Sec. 6, 7, 16(b) of the Fair Labor Standards Act of 1938, as amended.

Preliminary objections to the amended complaint, in the nature of a demurrer, were sustained by the Court of Common Pleas. On appeal to the Supreme Court of Pennsylvania, the judgment was affirmed.

The issue is whether an employee doing the type of work engaged in by appellant falls within the coverage of the Act or is excluded by reason of not being "in commerce" or "engaged in the production of goods for commerce".

The Defendant-Appellee Company is a partnership with its principal place of business in Camp Hill, Pennsylvania. It is engaged in the business of quarrying stone,

compounding stone mixtures and hauling its products to construction jobs being worked upon by defendant's employees where the various compounds are physically applied to the roadway, railroad bed, airport or other interstate projects. Plaintiff-appellant does his work on the company's premises, being engaged in compounding the materials which go into the roads or other projects engaged upon by his employer, and overseeing and directing the loading of the company trucks with the correct formulas for each specific project, after which he dispatches the loaded trucks to the site of the various projects. He reports to the office the nature, kind and quantity of materials compounded, and the number of trucks dispatched to the jobs. He does not physically apply the materials "on the road", and for this reason he was held to be an "off the road" employee, not covered by the Act.

ARGUMENT

I.

So-called "Off the Road" Employees Engaged in the Repair, Reconstruction, Extension or Maintenance of Interstate Highways, Roads, Railroads, Airports and Government Installations Are Engaged "In Commerce" or "In the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act of 1938, as Amended.

Appellee throughout the history of the instant case has taken the position that the "on the road—off the road" test supplies the legal answer to the question presented. It is submitted that there is no such absolute touchstone. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 520 affirming 124 F (2) 567. There is no exemption from coverage in the pertinent Act of Congress for employees who work

"off the road". The genuine test is that set forth by this Court in *Walling* v. *Jacksonville Paper Co.* 317 U.S. 564, and *Overstreet* v. *North Shore Corp.* 318 U.S. 125, as follows: "'It is clear that the purpose of the Act was to extend Federal control in this field throughout the fartherest reaches of the channels of inter-state commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

The "practical considerations" referred to by this Court were that the employees' work is "vital to the proper functioning of these structures as instrumentalities of inter-state commerce" (*Overstreet* 318 U.S. at 130) and "because without their services these instrumentalities would not be open to the passage of goods and persons across state lines" (Ibid.).

The preparation and hauling of materials and road mixes necessary for specific road repairs are, it is submitted, as "indispensable" and "vital" to the proper functioning of the channels of inter-state commerce as is the physical application of that mixture to the roadway. Under the ruling of the Supreme Court of Pennsylvania, however, only those employees actually engaged in the physical "on the road" application of the materials are "in commerce" and entitled to the benefits of the Act. The Court of first instance (Ct. of Common Pleas, Cumberland Co., Pa.) ruled as a matter of law that "off the road" employees such as appellant, engaged in making, over-seeing the hauling and keeping records of types of materials dispatched to various inter-state construction jobs, were not covered by the Act. The ruling of the Courts below overlooked, it is submitted, that Appellant's duties at the employer's plant was a "component part of and integrated unit" and "indispensable" to the proper carrying on of the inter-state projects.

The distinction made by the Court of first instance and affirmed by the Supreme Court of Pennsylvania is a fine, narrow one which is unrealistic and impractical. Numerous Federal decisions have recognized that an employee's activities need not be physically on the instrumenality of inter-state commerce in order for his work to be part of inter-state commerce within the meaning of the Act.

Walling v. *Jacksonville Paper Co.* 317 U.S. 564, (167 F(2) 286).

Walling v. *McCrody Construction Co.* 156 F(2) 932, certiorari denied, 329 U.S. 785.

Ritch v. *Puget Sound Bridge & Dredging Co.* 156 F(2) 334 (C.A. 9).

Appellant's work brought him into an immediacy of participation with the physical work being carried on "off the premises". *Walling* v. *Craig,* 53 F. Supp. 479; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657.

To eliminate appellant from coverage is to accept a fine legalistic distinction and unrealistic approach such as was condemned by this Court in *Walling* v. *Jacksonville Paper Co.* 317 U.S. 564 (167 F (2) 286 at 288).

In *Laudadio* v. *White Construction Co.* 163 F(2) 383, the draftsman who prepared preliminary paper work preparatory to the commencement of actual work at the construction site were held to be covered by the Act. If such employees had sufficient "immediacy of participation" to the inter-state project as to be covered by the Act, it seems to follow *a fortiori* that those who prepare the very materials which go into the channel of commerce and become a part of said instrumentality have an "immediacy of participation" in the "integrated" project so as to be a part of commerce.

What was said by the learned Court in *Tobin* v. *Alstate Construction Co.* 195 F (2) 577 (C.A. 3) is equally applicable to the instant case, for the same type of work under review in that case is the subject of the instant case: "We are of the opinion that Alstate's off the road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce are engaged 'in the production of goods for commerce' ".

II.

The Pennsylvania Supreme Court Refused to Follow the Ruling of the Highest Federal Judicial Authority to Pronounce Upon the Applicable Federal Statute.

The Pennsylvania Supreme Court expressly refused to follow the decision of the Federal Circuit Court (3rd C.A.) in deciding the instant case. See *Thomas* v. *Hempt Bros.* 371 Pa. 383. Instead it purported to follow a 1946 decision of the Tenth Circuit (*Schroeder* v. *Clifton*, 153 F(2) 385, certiorari denied 328 U.S. 858) which the Third Circuit found was not controlling under the facts before it. The Court of first instance (Ct. of Common Pleas, Cumberland Co., Pa.) ruled as a matter of law that the *Schroeder* case excluded "off the road" employees from coverage under the Act, sustaining a demurrer to the Complaint, and thus ruling without hearing any testimony at all in the case. (R p. 15)

An examination of the facts in the instant case and the Alstate case show at once that the *Schroeder* case cannot be controlling. In the *Schroeder* case there was a *finding of fact*, after evidence offered, that the stone pickers within quarry excavations were engaged in local commerce. Moreover, the *Schroeder* case does not actually rest upon a determination of the status of the quarry workers but rather upon a distinction between original

construction and repair. In the light also of the later decisions in *Walling* v. *McCrody* (C.A. 3) and *Bennett* v. *V-P Loftis Co.* 167 F(2) 286 (C.A. 4) it is submitted that the general classifications set up by the *Schroeder* case are at least of doubtful authority and are directly in conflict with the rulings of the cited cases.

III.

The Pennsylvania Supreme Court Erred in Affirming the Judgment of the Trial Court, Which Judgment Was Entered on the Pleadings.

The Trial Court sustained defendant's (appellee's) demurrer to plaintiff's (appellant's) amended Complaint (R. pg. 13) holding as a matter of law that no cause of action existed within the provisions of the Fair Labor Standards Act. On appeal the Supreme Court of Pennsylvania affirmed. (R. pg. 18)

If plaintiff (appellant) is covered by the Act, as it is contended that he is, on the authority of the Federal decisions cited in paragraphs I and II of this brief, then the action of the Trial Court in sustaining the demurrer to the pleadings and the action of the Supreme Court of Pennsylvania in affirming the lower Court was erroneous, and should be reversed by this Court.

Paragraph IV of the Amended Complaint (R. pg. 3) sets forth the allegations which the Court of first instance ruled did not state a cause of action under the Fair Labor Standards Act. (R. pg. 13, 14, 15, 16) The conclusion of the learned Trial Court is expressed in the following language: (R. pg. 14)

> "In support of his demurrer the defendant contends that the plaintiff's Complaint affirmatively discloses that the plaintiff was an off-the-road employee, at a quarry, and therefore was beyond the scope of the Fair Labor Standards Act of 1938, and that the

defendant is therefore entitled to a judgment on the pleadings. A consideration of the decisions interpreting the Act leads to the conclusion that this position is well taken."

This ruling, affirmed on appeal by the Supreme Court of Pennsylvania, directly conflicts with the ruling of the Circuit Court (3rd) in *Tobin* v. *Alstate, supra*, so that there presently exists within Pennsylvania one rule for litigants in the Federal Courts and another for litigants in the State Courts.

For the reasons set forth in this brief, it is submitted, the decisions of the State Courts are erroneous and should be set aside by this Court.

IV.

Plaintiff Did Not Re-amend His Complaint Since He Could Not Aver Any Different Factual Situation From the One Set Forth in the Pleadings.

The Trial Court accorded Plaintiff an opportunity to amend its Amended Complaint within 20 days if he cared to do so prior to entry of judgment against him. Plaintiff did not elect so to do but instead appealed to the Supreme Court of Pennsylvania after judgment was entered in the Court below. Appellee has contended that Plaintiff (appellant) ought to have availed himself of the opportunity to re-amend. To have done so, however, would have only served to prolong the litigation and involve additional and futile argument on the pleadings, for Plaintiff had set forth his allegations as factually as possible. He could not state any different facts unless he resorted to an unrealistic factual situation. Hence he chose not to re-amend his Complaint, but instead to have the issue passed upon by the appropriate appellate tribunal.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed and set aside and the lower court directed to enter judgment in favor of appellant.

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IN THE

Supreme Court of the United States

October Term, 1952

NO. 410

ADAM THOMAS,

Petitioner

vs.

HEMPT BROTHERS, a Partnership,

Respondent

BRIEF FOR RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

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SUPREME COURT OF THE UNITED STATES

October Term, 1952 No. 410

ADAM THOMAS,
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v.

HEMPT BROTHERS, a partnership,
Respondent

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPORTED OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Pennsylvania, in *Thomas v. Hempt Brothers,* is reported in 371 Pa. 383. On a prior phase of this litigation the Court of Common Pleas filed an Opinion reported in Thomas v. Hempt Brothers, 74 Pennsylvania District and County Reports 213.

JURISDICTION

While petitioner erroneously invokes jurisdiction under 28 U.S.C.A. 1254, respondent calls attention to 28 U.S.C.A. 1257 providing for review by the Supreme Court by writ of certiorari where any right is claimed under a statute of the United States, in case of a final judgment rendered by the highest court of a state in which a decision could be had.

QUESTION PRESENTED

The petition presents the question whether an employee producing local materials for local use in a quarry serving the usual miscellany of local customers is engaged in commerce or in the production of goods for commerce within the meaning of section 7 of the Fair Labor Standards Act of June 25, 1938, 29 U.S.C. A., section 207, in any week when such local materials happen to be used thereafter in new construction or repair of nearby interstate highways or facilities in the same state.

STATEMENT OF CASE

The Supreme Court of Pennsylvania answered in the negative the question presented and affirmed a judgment of the Court of Common Pleas of Cumberland County sustaining the demurrer of Hempt Brothers to a re-amended complaint of Adam Thomas.

Adam Thomas as plaintiff sued Hempt Brothers, his employer, for overtime compensation for a period ending April 15, 1945. Further circumstances as to the course of that litigation in the state courts of Pennsylvania appear at appropriate points in the ensuing argument. In a re-amended complaint (Transcript of Record 3-4, 19, the opinion of the Supreme Court of Pennsylvania, 371 Pa. at pages 385 and 386) Thomas averred that he worked in the quarry of Hempt Brothers near Camp Hill (a suburb of Harrisburg), Pennsylvania, producing and mixing sand, stone and cement, loading concrete mixing trucks and giving directions as to place of delivery to various customers such as the contractor "building the Pennsylvania Turnpike." These were local materials for local delivery, all in Pennsylvania. Such materials were used in the construction and in the repair of facilities of interstate commerce, such as highways, railroads, and airports. On demurrer, without passing on other preliminary objections, it was held that Thomas in his re-amended complaint had again failed to state a cause of action within the provisions of the Fair Labor Standards Act.

The relevant statute, the Fair Labor Standards Act, 29 U.S.C.A. 207, provides that an employer shall pay overtime compensation, at one and one-half times the regular rate, to "any of his employees who is engaged in commerce or in the production of goods for commerce . . ." As amended October 26, 1949, section 3 of that Act, 29 U.S.C.A. 203 (b) and (j), pocket part, provides that:

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several states or between any State and any place outside thereof. * * *
>
> "* * * an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

ARGUMENT

(1).

The power to issue certiorari should be exercised sparingly and with great caution in cases of peculiar gravity and general importance. This jurisdiction was not conferred merely to settle matters of private interest, or to burden the court's calendar with a case such as the present one where only a limited phase of the litigation would be before the court and the rights of the parties would not be finally determined by a decision reversing a state supreme court on the single issue for which review is sought.

(2)

A reversal would not finally determine the present action. The respondent's demurrer, which was sustained, was filed under Pennsylvania Rule of Civil Procedure 1017 (b) (3) and, as stated in 2 Anderson, Pennsylvania Civil Practice, page 350:

> "If the demurrer is overuled, the demurring party has an absolute right to file a responsive pleading * * *"

Moreover, in a prior phase of this litigation (see Docket Entries, page 2 of Transcript of Record) on petitioner Thomas' complaint as first amended, where the state court entered judgment on the pleadings for

defendant Hempt Brothers, in *Thomas v. Hempt Brothers,* 74 Pennsylvania District and County Reports, 213, 218 (October 28, 1950), the defendant by answer including new matter, raised substantial defenses under the Portal-to-Portal Act, 29 U.S.C.A. section 251. It should be noted that in 1945 when the Wage-Hour Administrator revoked the prior rulings (upon which Hempt Brothers alleged in its answer to Thomas' complaint as first amended that it had relied in good faith) and ruled on the contrary for the first time that the Administrator would thereafter interpret the Fair Labor Standards Act to cover workers producing local materials for facilities of interstate commerce, Hempt Brothers immediately complied with that revoluntionary ruling and thereafter paid Thomas time and a half for any week when he worked over 40 hours. That is the very reason that Thomas' suit is restricted (Transcript of Record, pages 3 to 11) to a period prior to April 15, 1945. By the instant demurrer, to the re-amended complaint, raising preliminarily the question of law on which petitioner now invites the Supreme Court of the United States to rule, Hempt Brothers did not under the applicable Pennsylvania Rules of Civil Procedure waive the defenses heretofore raised by answer to the prior amended complaint. Such defenses, including good faith reliance on the Administrator's prior rulings, would be pleaded in due course were this court to rule in Thomas' favor, as requested in this petition, on one of the several elements in the case.

In addition, Hempt Brothers filed, along with the demurrer in question, other preliminary objections.

Were this court to reverse, on the issue presented by the demurrer, the issues presented by the other preliminary objections to Thomas' re-amended complaint would then have to be decided by the Court of Common Pleas of Cumberland County, Pennsylvania. One of those issues is whether the Fair Labor Standards Act covers new construction. The re-amended complaint (Transcript of Record, page 4, paraphrased in part in the petition at page 4) averred obvious new construction, for example, that sand, stone or cement produced or mixed by Thomas at the Hempt quarry was used, inter alia, by "* * * the contractor engaged in laying and building the Pennsylvania Turnpike, * * *" This court has ruled original construction outside the bounds of the Act: *Murphy v. Reed, et al., doing business as M. T. Reed Construction Company*, 335 U.S. 865, 69 S. Ct. 105.

Patently, this is not the proper vehicle for a test case on coverage of quarry employees producing local materials for local use, for the litigation would not be determined, unless this court affirmed, which would not help petitioner.

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(3)

The Supreme Court of Pennsylvania properly affirmed a judgment for Hempt Brothers, on the pleadings, under the applicable Pennsylvania practice. Petitioner's fifth specification, concerning such a judgment on the pleadings presents no substantial federal question. *No constitutional right to trial by jury was denied.* Thomas had ample opportunity to amend. The

demurrer on which judgment was entered was directed to a re-amended complaint. The trial court indeed authorized Thomas to file a further amended complaint (Transcript of Record, page 16) but Thomas did not choose to do so. In *Thomas v. Hempt Brothers,* 74 Pennsylvania District and County Reports 213, 214, 215, 217, the trial court held insufficient Thomas' prior amended complaint baldly averring (without setting forth the exact nature of his work) that his work was in interstate commerce, and admonished (at page 217) that under the Pennsylvania system of fact pleading:

> "The whole purpose of our practice in permitting motions in the pleading stage is to clarify the issues and to permit the disposition of cases on which there is no basis for recovery and thus avoid the necessity of a trial."

No such situation was presented in petitioner's (page 7) summary remand cases.

The Supreme Court of Pennsylvania (Transcript of Record, page 18, 371 Pa. at 385), in holding insufficient the present re-amended complaint, pointed out that Thomas had been given every opportunity to plead facts, if such existed, stating a cause of action under the Fair Labor Standards Act. This was a most fitting case for a familiar exercise of undoubted judicial power to enter judgment on the pleadings.

---

(4)

On the legal issue which petitioner would have this court decide *the Supreme Court of Pennsylvania*

reached a correct conclusion (distinguishing at page 395 of 371 Pa., Transcript of Record, page 26, the decision of this court in *Roland Electrical Company v. Walling*, 326 U.S. 657, from which petitioner at page 8 quotes in closing) in view of the refusal of this court in *McLeod v. Threlkeld*, 319 U.S. 491, 494, 497 to extend the conception of "in commerce" beyond the employees "engaged in actual work upon the transportation facilities," and in view of the inference, that later received congressional confirmation (see Conference Report No. 1453 on Amendments to the Fair Labor Standards Act, 81st Cong., 1st. Sess., 1949, U.S. Code Congressional Service, vol. 2, pp. 2251, 2252-2254), drawn in *E. C. Schroeder Co., Inc. v. Clifton*, 153 F. 2d 385, 390 (C.C.A. 10, 1946), cert. den. 328 U.S. 858, that

> "If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention. We fail to find anything in the language of the Act or its legislative history which lends support to the view that Congress proposed to bring workmen of that class within the coverage."

Accordingly, this is not an appropriate case for review by the Supreme Court of the United States.

CONCLUSION

This Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 410

ADAM THOMAS,

Petitioner

v.

HEMPT BROTHERS, a Partnership

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

(See Rule 27 (2) (b))

The opinion of the Supreme Court of Pennsylvania, in *Thomas v. Hempt Brothers,* is reported in 371 Pa. 383.

On prior phases of this litigation, a preliminary objection (in the nature of a motion for a more specific pleading) to Thomas' first complaint was sustained in *Thomas v. Hempt Brothers,* 62 Pennsylvania District and County Reports 618 (1948), and on Thomas' second or amended complaint a motion against him for judgment on the pleadings was sustained in *Thomas v. Hempt Brothers,* 74 Pennsylvania District and County Reports 213 (1950): the opinions were delivered by the Court of Common Pleas of Cumberland County, Pennsylvania.

The Cumberland County Court opinion of August 8, 1951 (T. 13-16) on the third or re-amended complaint here in issue has not yet been reached for printing by the District and County Reporter.

GROUND ON WHICH JURISDICTION IS INVOKED

The Supreme Court, under section 1257 of the Judicial Code of 1948, 62 Stat. 929, 28 U.S.C.A. sec. 1257, has jurisdiction to review by certiorari a final judgment rendered by the highest court of a state in which a decision could be had, where any right is claimed under a statute of the United States.

STATEMENT OF THE CASE

1. Was petitioner in his work at respondent's quarry engaged in commerce?

2. Does production of goods for commerce extend to production of goods *necessary* for *instrumentalities of* commerce so as to bring within the coverage of section 7 of the Fair Labor Standards Act of 1938 petitioner's production at respondent's quarry of rock and other materials for concrete imbedded in highways and other structures of instrumentalities of interstate commerce within one and the same state?

These questions are presented by a demurrer (T. 11-12) to a re-amended complaint (T. 2-11) filed November 18, 1950 (T. 2) by petitioner Thomas in a state court suit under section 7 of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. sec. 207, for overtime wages for a period ending (T. 6 and 11) April 14, 1945.

Petitioner in his re-amended complaint averred, in paragraph 2 (T. 3) that respondent Hempt Brothers was a partnership "engaged in the stone quarry business" near Camp Hill, Cumberland County, Pennsylvania.[1]

[1] Respondent's "quarry business" was the essentially local business of its kind serving the usual miscellany of local customers. It had the usual farm, contractor, residential and other customers as varied as are the uses of

The remaining averments material to a consideration of the questions presented are found in paragraph 4 (T. 3-4). Briefly stated, petitioner Thomas worked at respondent's quarry on materials whose only claimed connection with interstate commerce was their use in the same state in immovable structures of instrumentalities of interstate commerce.

During the period prior to April 15, 1945, as averred in the first half of paragraph 4, petitioner was employed (T. 3-4) by respondent

> "... in its operation of a quarry wherein he * * * labored * * * in producing, processing, weighing and mixing sand, stones and cement, and loading trucks containing concrete, and giving directions to company truck drivers as to the place of delivery daily of truck loads of sand and cement (concrete) to various customers of the said company, being namely, the contractor engaged in laying and building the Pennsylvania Turnpike, a highway which handles the flow of commerce between the states; to the Harrisburg Municipal Airport, for the building and erection of landing fields to accommodate the flow of airplanes in Interstate Commerce; to the Pennsylvania Railroad for use in the repair and maintenance of its roadbeds for the operation of its interstate passenger

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stone and concrete, its "customers daily including," as the complaint continues, some interstate instrumentalities whose proportionate patronage of this "quarry business" in the country outside of Camp Hill, Pennsylvania, is not claimed in the complaint to be substantial, much less exclusive.

and freight trains; to the United States Army Depot; the U.S. Navy Depot; and other similar projects which aided the flow of commerce * * *"

In explanation of this averment, we observe that such deliveries were all made in the same state in which was located the quarry at which petitioner worked.[2]

The rest of the averments in paragraph 4 of the re-amended complaint relate to petitioner's duties and suggest no other connection between his work and interstate commerce.[3]

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[2] The portion of the Pennsylvania Turnpike in question was constructed in Cumberland County, the Airport and Army Depot were located near New Cumberland, Cumberland County, the Pennsylvania Railroad operated a Cumberland Valley Branch through Mechanicsburg and the U. S. Navy Depot was constructed at Mechanicsburg, Cumberland County. The Court of Common Pleas of Cumberland County (T. 16) took "judicial notice of the fact that all of the customers referred to in the complaint are situated within this state." Thomas took no advantage of the opportunity to amend (T. 16) to negative the fact noticed.

[3] Petitioner (T. 4) daily was given orders received by respondent for concrete, "secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customers, said customers daily including, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, as aforesaid, railroads, airports and various other interstate channels."

These averments appear in petitioner's (T. 1, 2) third, twice-amended, complaint. Petitioner was accorded an opportunity to amend still another time (T. 16) but "failed to file a further amended complaint" (T. 18). In petitioner's brief (at page 8) it is candidly stated that

> "Plaintiff had set forth his allegations as factually as possible. He could not state any different facts unless he resorted to an unrealistic factual situation. Hence he chose not to re-amend his Complaint, but instead chose to have the issue passed upon by the appropriate appellate tribunal."

As pointed out by the Supreme Court of Pennsylvania (T. 19),

> "The complaint does not contain any averment that the materials processed, handled or dispatched by the plaintiff either originated or were delivered outside of Pennsylvania; however, it is readily conceded that the defendant's customers maintained facilities for handling persons or property moving in interstate commerce."

On these facts, the Court of Common Pleas on August 8, 1951 (T. 2, 13-16) held that petitioner was not within the coverage of the Fair Labor Standards Act and sustained a preliminary objection in the nature of a demurrer and the Supreme Court of Pennsylvania on June 24, 1952 (T. 17, 18-27) affirmed.[4]

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[4] Had the demurrer been overruled, under Pennsylvania practice (see pages 6 to 9 of respondent's brief opposing Thomas' petition for writ of certiorari) respondent Hempt Brothers as defendant would have had an

Mr. Justice Musmanno dissented (T. 30) on the ground that petitioner was "engaged in handling material in interstate commerce."

The Supreme Court of Pennsylvania, speaking through Mr. Justice Jones, in its comprehensive opinion (T. 18-27) reviewed *Overstreet v. North Shore Corporation*, 318 U.S. 125, and *McLeod v. Threlkeld*, 319 U.S. 491, 497, and held that the processing of material at a quarry for local use on interstate highways and instrumentalities of commerce was not so closely related to the movement of the commerce as to be a part of it. It also analyzed *Tobin v. Alstate Construc-*

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absolute right to file a responsive pleading. Responsive pleadings on the facts, including new matter raising substantial additional defenses, were indeed filed to the amended or second complaint of Thomas on which judgment against Thomas was entered on the pleadings (see T. 2). Further, a motion for a more specific statement (T. 12, 16), not acted upon since the demurrer simultaneously filed (as permitted under Pennsylvania practice) was sustained, would first require decision and raises further issues as to coverage, of original construction which the Supreme Court of the United States has ruled outside the bounds of the act: Murphy v. Reed, et al., doing business as M. T. Reed Construction Company, 335 U.S. 865. The Pennsylvania Turnpike involved in Thomas' suit is a classic example of original construction, like the Alcan Highway, Crabb v. Welden Bros., 164 F. 2d 797, 803 (C.C. A. 8, 1947), or the Haines Cut-Off Road, Baloc v. Foley Bros., 68 F. Supp. 533, 537 (D.C. Minn., 1946). Such being the procedural posture of the case below, the Supreme Court of the United States cannot accede to the plea (brief for appellant, page 9) that

> "The judgment of the Supreme Court of Pennsylvania should be reversed and set aside and the lower court directed to enter judgment in favor of appellant."

tion Company (T. 23-25), 195 F. 2d 577 (C.A. 3, April 9, 1952) and the so-called "ice cases" and *E. C. Schroeder Co., Inc. v. Clifton*, 153 F. 2d 385 (C.C.A. 10, 1946), cert. den. 328 U.S. 858, and related cases, and held that petitioner did not produce goods for commerce by reason of the use of his stone and concrete aggregate in "maintenance of the interstate instrumentalities" in the same state.[5]

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[5] The decision, on the pleadings, rested on a solid basis in fact that Thomas worked at the Hempt quarry on materials whose only claimed connection with interstate commerce was their use in the same state in immovable structures of instrumentalities of interstate commerce. Thomas concedes (at page 8 of his brief) that in his reamended complaint he has "set forth his allegations as factually as possible" and as favorably as possible. The Supreme Court of the United States can therefore decide, with finality, the issue of public importance common to this case and to Alstate Construction Company v. Tobin, No. 296 October Term, 1952, whether "production of goods for commerce" means production of goods *necessary* for *instrumentalities of* commerce.

As to other fringe facts, irrelevant to production of goods for commerce coverage, the burden rested upon Thomas under Pennsylvania's system of fact pleading to plead sufficient facts, and he was accorded no less than four opportunities so to do. While Thomas argues (at page 3 of his brief) in terms of "overseeing and directing the loading of the company trucks," his averment (T. 4) that he "filled and loaded the trucks and dispatched them" to the named "interstate channels" was considered by the Supreme Court of Pennsylvania (T. 21) which observed that "His supervisory duties did not actually connect him with the movement of commerce nor was the service which he thus performed so closely related to commerce as to be, for all practical purposes, a part of it * * * under the facts pleaded, the plaintiff was not engaged in commerce * * *"

The dissenting justice (T. 28) drew an unwarranted inference from the fact that since April 15, 1945, respondent had paid petitioner Thomas time-and-a-half for overtime. It is true that prior to that time, in accordance with the Administrator's interpretation (release G-162 of May 15, 1941, 1944-1945 Wage-Hour Manual 36 and prior interpretations, see point I-D infra), respondent had paid petitioner his regular hourly rate for overtime; and after that time, in accordance with the Administrator's belated assertion of coverage (release A-14 of March 13, 1945, 1944-1945 Wage-Hour Manual 1947-1948 clarified in a letter of April 10, 1945, see Point I-D-5 infra) respondent paid time-and-a-half for overtime. Any inference (such as the dissenting justice drew, T. 28) that "defendant believes that plaintiff's work is of an interstate character" is entirely unwarranted. Respondent could not afford to run the risks entailed in non-compliance with the Administrator's position. It was conformity without conviction.

While Thomas now argues (at page 3 of his brief) that "He reports to the office the nature, kind and quantity of materials compounded," etc. there is no averment to support the argument, even if material. Any inference from the brief of Thomas (at page 3) that any of the "construction jobs" pleaded were "being worked upon by defendant's employees" is inadmissible; there is no allegation in the re-amended complaint (T. 3-4) that respondent Hempt was the contractor or that its employees worked upon any construction jobs. On the contrary, the complaint speaks of delivery to "various customers" and of delivery to "the contractor." The implication is that respondent itself did not perform repair and reconstruction and that was the state court construction of the pleadings.

This is thus a suit by one employee at respondent's quarry to impose, retroactively under the broadened 1945 administrative interpretation hereinafter considered, a heavy liability for the years 1941-1945 for additional overtime compensation over and above the regular wages paid. Petitioner's wages (T. 7-11), increasing year by year from 50 to 75 cents per hour, were well above the minimum prescribed seven and more years ago for the period covered by this suit.

STATUTE INVOLVED

The following provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060-1069, 29 U.S.C.A. sec. 201, et seq.; as originally enacted are pertinent to this suit relating to the years 1941-1945.

"Maximum Hours

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above-specified at a rate not less than one and one-half times the regular rate at which he is employed."

52 Stat. 1060, 29 U.S.C.A. sec. 203(b).

"Definitions

"Sec. 3 As used in this Act—

* * *

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

52 Stat. 1060, 29 U.S.C.A. sec. 203(b).

"* * *

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

52 Stat. 1061, 29 U.S.C.A. sec. 203(i) and (j).

"Finding and Declaration of Policy

"Sec. 2(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3)

constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

52 Stat. 1060, 29 U.S.C.A. sec. 203 (a).

Other statutory provisions bearing on the construction of the statutory coverage of employees "engaged in commerce or in the production of goods for commerce" and on the meaning of "transportation" are collected, infra, under Point III-E.

ARGUMENT

Summary

From 1941 to 1945 petitioner Thomas worked at respondent's quarry. He produced rock and other local materials. Some of the materials entered into highways and other concrete structures of instrumentalities of interstate commerce. The materials never left the state. He brought suit for additional overtime compensation under section 7 of the Fair Labor Standards Act, 52 Stat. 1060, 1063, 29 U.S.C.A. sec. 207. Section 7 applies to two classes of employees "engaged in commerce or in the production of goods for commerce." Does petitioner come within either class of employees covered by the Act?

Petitioner was not *engaged in commerce.* He produced local materials for local use. His production included loading of the materials; he "filled and loaded the trucks and dispatched them to the particular customer * * *" In its claimed connection with instrumentalities of interstate transportation, his work, which is decisive, was not "so closely related to the interstate movement" passing over such instrumentalities and was not so "closely related to interstate transportation" as to be in practice and legal relation a part thereof: *Overstreet v. North Shore Corporation,*

318 U. S. 125, 130; *McLeod v. Threlkeld*, 319 U. S. 491, 497. These decisions enunciate a *practical test*, evolved in cases arising under the Federal Employers Liability Act. That test was correctly applied by the Supreme Court of Pennsylvania. Its judgment is confirmed (Point I-C, D, and E, infra) by *analogous decisions under the Federal Employers Liability Act*, such as *McLeod v. Southern Pacific Co.*, 299 Fed. 616, 617 (D. C. Tex. 1924), by contemporary *administrative construction* of the Fair Labor Standards Act, e. g. formal release G-162, 1944-1945 Wage and Hour Manual 36, and by pertinent *federal and state court decisions*, e.g. *Walling v. Craig*, 53 F. Supp. 479, 482, 493 (D.C. Minn. 1943) and *McComb v. Trimmer*, 85 F. Supp. 565 567, 570 (D.C. N.J. 1949).

Nor was petitioner engaged in the *production of goods for commerce*. He was of course engaged in production, but he was not producing goods for commerce. At most he was producing material "to supply the needs of" "instrumentalities of" commerce: see 1944-1945 Wage and Hour Manual 1947-1948.

The act plainly defines for coverage employees engaged in "the production of goods for commerce." The act *distinguishes such employees from employees engaged in commerce*, and provides two distinct bases for coverage. For the period in question, by section 3(j) it extended the production coverage to any "occupation necessary to the production" but it did not extend "in commerce" coverage to any occupation necessary to commerce. The basic structure and language of the act precludes extension of this second class of production employees to include production to supply the

needs of instrumentalities of commerce. Such an extension of the second class for coverage would engulf the first. Such an extension would cover, as engaged in production, the bolt-carrying employee in the Pedersen case (229 U.S. 146) who has been held, on the contrary, to be engaged in commerce: cf. *Overstreet v. North Shore Corporation*, 318 U.S. 125, 130. Instrumentalities of commerce, referred to by Congress in another connection, were not included when Congress defined commerce. In relation to the facts in this case, the act defines commerce as *transportation*, and expresses the intention to cover production of goods for interstate transit in the stream of commerce.

Contemporary administrative construction of the act recognized that employees like petitioner were not engaged in the production of goods for commerce. The Administrator so reiterated in 1941 (1944-1945 Wage and Hour Manual, p. 36) and consistently so ruled for some seven years after the enactment of the act.

From the first *the courts likewise held* that production of local materials at a quarry or gravel pit for use in a highway in the same state was not covered by the act: *Walling v. Craig*, 53 F. Supp. 479, 483 (D. C. Minn. 1943).

The *legislative history*, too, confirms this reading of the act (Point III-B, infra). Even in the broader sweep of the original bills, the objective (81 Cong. Rec. 4960-4961), Senate Report No. 884, pages 1-3, House Report No. 1452, pages 5-7, 75th Cong. 1st Sess.) as defined in the Presidential message of May 24, 1937, was that

> "... when goods pass through the channels of commerce from one State to another they become subject to the power of the Congress * * * we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce * * *"

In the Conference Agreement, where coverage was restricted to employees engaged in commerce or in the production of goods for commerce, as Senator Thomas explained in the final Senate debate (83 Cong. Rec. 9163) of June 14, 1938,

> "... both Houses obtained their common objective, which was to abolish traffic in interstate commerce in the products"

of underpaid and overworked labor.

In short, the words of the act, as finally enacted, relating to employees engaged in "the production of goods for commerce," should be read as written. Production of goods for commerce, within the meaning of section 7 of the Fair Labor Standards Act of 1938, does not extend to an employee engaged in the production of materials necessary for an instrumentality of commerce. Petitioner, therefore, was engaged neither in commerce nor in the production of goods for commerce, and the decision of the Supreme Court of Pennsylvania should be affirmed.

POINT I.

WORKMAN IN QUARRY PRODUCING LOCAL MATERIALS FOR LOCAL USE IS NOT ENGAGED IN COMMERCE BY REASON OF IMBEDDING OF MATERIALS IN CONCRETED, PERMANENT, FIXED FACILITIES OF INSTRUMENTALITIES OF INTERSTATE TRANSPORTATION IN SAME STATE

The first question, then, is whether petitioner Thomas was "engaged in commerce" within the meaning of Section 7 of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063. 29 U.S.C.A., sec. 207. Answering this question in the negative, the Supreme Court of Pennsylvania (T. 21) concluded that "under the facts pleaded, the plaintiff was not engaged in commerce within the intendment of the Fair Labor Standards Act."

A. The practical "in commerce" test

The applicable test for determining "in commerce" coverage has been established by the decisions, which the Supreme Court of Pennsylvania followed, of this court in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 128, 129, 132, and *McLeod v. Threlkeld*, 319 U.S. 491, 495. As stated in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 128, 129, 1932:

"A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act * * * before the 1939 amendment * * *

"We think that practical test should govern here. * * *

"The Federal Employers' Liability Act and the Fair Labor Standards Act * * * are similar * * * Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

As restated in *McLeod v. Threlkeld*, 319 U.S. 491 495,

". . . the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act."[6]

This test recognizes that it is inevitable that the statutory coverage of employments "in commerce" should

[6] The McLeod case was complicated by a conflict of cases under the Federal Employers' Liability Act between a decision, upon which the dissenting justices relied, covering a cook for railroad bridge carpenters and "another line of cases" later limiting that Act to "acts so closely related to transportation as to be themselves really a part of it" and the court accordingly admonished that the "over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act" prior to its amendment in 1939 "is not to be repeated in the administration and operation of the Fair Labor Standards Act": *McLeod v. Threlkeld*, 319 U.S. 491, 495.

be defined by process of inclusion and exclusion. Accordingly in determining what employments that assist the functioning of transportation are in interstate commerce, under such statutory language, as in *Industrial Accident Commission v. Payne,* 259 U.S. 182, 187,

> ". . . We are brought to a consideration of degrees, and the test declared, that the employe . . . must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it"

B. Supreme Court applications of test

On the one hand, the test thus pronounced extends "in commerce" coverage of the act to numerous employees directly assisting the actual operation of instrumentalities of commerce and so closely related to interstate transportation as to be in practice and legal relation a part thereof. (1) The act extends to "operational employees" of a private toll road which afforded passage to "an extensive movement of goods and persons between Florida and other states:" *Overstreet v. North Shore Corporation,* 318 U.S. 125, 127, 130 ("Overstreet operated the drawbridge . . . Garvin sold and collected toll tickets"). (2) The act likewise covers a truckline rate clerk, whose rating of the shipping documents was prerequisite to immediate movement of the goods covered thereby to other states; as stated in *"Overnight Motor Transportation Co. v. Missel,* 316 U.S. 572, 575,

"It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act."

(3) Mechanics, too, greasing and "maintaining the transportation equipment" of an interstate carrier "are well within the requirement:" *Boutell v. Walling*, 327 U.S. 463, 465, 472. (4) Also engaged "in commerce" are persons "engaged in maintaining and repairing" vehicular roads and bridges or railroad tracks and bridges "used by persons and goods passing between the various States:" *"Overstreet v. North Shore Corporation*, 318 U.S. 125, 127, 129, 130 ("Brazle was engaged in maintenance and repair work on the road and the bridge"); *J. F. Fitzgerald Construction Co. v. Pedersen*, 318 U. S. 740, 324 U.S. 720, 724 ("employees who actually repair abutments or substructures of bridges on which are laid tracks used in interstate commerce". Congress had maintenance-of-way workers forcefully brought to its attention.[7]

Numerous analogous cases show, as tersely summarized in *Industrial Accident Commission v. Payne*, 259 U.S. 182, 187, that:

". . . we come to the relation of the employment to the actual operation of the instrumentali-

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[7] See Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong. 1st Sess. (1937), witness L. E. Keller for Brotherhood of Maintenance of Way Employees, pp. 1149-1160 and statement at p. 1148 to witness Hay for Railway Executives Association by Senator Black, the Chairman: "I wish you would prepare another amendment which . . . would leave in those in the maintenance of way, some of whom make 15 cents an hour. . ."

ties for a distinction between commerce and no commerce * * * tracks, bridges and roadbed and equipment in actual use, may be said to have definite character and give it to those employed upon them."

On the other hand, this statutory conception of "in commerce" does not extend beyond the employees engaged in actual work upon the transportation facilities to those who indirectly assist the functioning of interstate transportation. (5) A cook, working in a car "running on the railroad's tracks," for maintenance of way employees is not engaged in commerce under the Fair Labor Standards Act: *McLeod v. Threlkeld,* 319 U.S. 491, 494-497. (6) Likewise, under the Federal Employers Liability Act, it has been held that an employee of a railroad, while he is mining, in the carrier's colliery, coal intended to be used by its interstate locomotives is not engaged in interstate commerce: *Delaware, L. & W. R. Co. v. Yurkonis,* 238 U.S. 439, re-affirmed and extended in *Chicago, B. & O. R. R. v. Harrington,* 241 U.S. 177. As explained in the leading case of *Shanks v. Delaware, L. & W. R. Co.,* 239 U.S. 556, the "coal miner . . . was too remote from interstate transportation . . ." (7) The non-coverage of numerous employments "having cause in the movements that constitute commerce but not being immediate to it" was established in *Industrial Accident Commission v. Payne,* 259 U.S. 182, 187, where it is stated that:

"Commerce is movement, and the work and general repair shops of a railroad, and those employed in them are accessories to that movement,

indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce."

Of such cases it may fairly be said, as in *McLeod v. Threlkeld*, 319 U.S. 491, 496-497, that:

> "They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under the present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to the interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

The contention "that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities" was carefully considered and rejected in *McLeod v. Threlkeld*, 319 U.S. 491, 494, 498.

Manifestly, therefore, under the test thus pronounced and illustrated, there was no such close or direct relation to interstate transportation in the handling at a quarry of rock, sand and dry cement which thereafter as concrete became imbedded in railroad, highway, airfield or depot structures. Petitioner's work at the quarry, like that of one Thomas who was concerned in *Chicago & E.I.R. Co. v. Industrial Commission*, 284 U.S. 296, with "hoisting coal into a chute . . . for the use of locomotive engines" and "like

that of the coal miner in the Yurkonis case" as explained in *Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556, "was too remote from interstate transportation . . ."

Precisely the same conclusion, that such work at a quarry is not "in commerce" has been reached in the federal and state court cases arising under the Federal Employers Liability Act, and in administrative interpretations and court decisions under the Fair Labor Standards Act in harmonious application of the Supreme Court's decisions.

C. Federal Employers Liability Act cases excluded quarry workers

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The cases under the Federal Employers Liability Act uniformly recognized the principle that a worker at a stone quarry, like a coal miner, was not engaged in commerce: *McLeod v. Southern Pacific Co.*, 299 Fed. 616, 617 (D.C. Tex. 1924); *Yazoo v. Mississippi Valley R. Co.*, 114 Miss. 888, 75 So. 690, 690-691 (Miss. 1917); *Conway v. Southern Pacific Co.*, 67 Utah 464, 248 P. 115, 117, 118 (Utah, 1926); Note, 12 Minn. L. R. 499, 504.

(1) In *McLeod v. Southern Pacific Co.*, 299 Fed. 616, 617, supra, District Judge Smith said of that McLeod that:

> ". . . he was engaged in mining rock intended to be used in the repair or improvement of defendant's roadbed. This was not an interstate

commerce service, nor so closely connected with such service as to be a part thereof. * * *

"That the rock which plaintiff was engaged in taking from the quarry at the time he was injured was intended for use in repairing the defendant's roadbed, which was being used for interstate commerce, did not make his employment interstate commerce."

(2) In *Yazoo v. Mississippi Valley R. Co.*, 114 Miss. 888, 75 So. 690, 690-691, supra, involving "a day-laborer engaged in loading sand and gravel upon cars, which sand and gravel was to be used in the repair of appellant's lines of railroad" President Judge Cook held that the work was not in interstate commerce and said:

". . . the deceased was employed in mining gravel for the ultimate repairing or building of the highway over which the interstate commerce of the railroad would be operated. Yurkonis was employed in mining coal to be used by the carrier to make steam power for the transportation of its commerce between the states * * *

"It seems to us that the character of the work * * * in the Yurkonis Case and in the present case are strikingly similar."

(3) In *Conway v. Southern Pacific Co.*, 67 Utah 464, 248 P. 115, 116, 117, 118, supra, where Conway "was engaged in loosening rock" at the "rock quarry of the respondent" railroad which in turn "was engaged in making repairs on its railroad track across Great Salt Lake, and used in interstate commerce, by

rock fills and raising the track", the Supreme Court of Utah, in an elaborate opinion by Straup, J., distinguished the maintenance of way men working on the railroad (*Pedersen v. D. L. & W. R. R. Co.*, 229 U.S. 146) and their cook "with the camp car on the side or switch track close to the bridge," (*Phila. B. & W. R. R. Co. v. Smith*, 250 U. S. 101) as being "several degrees removed from such a situation" and held (at page 117) that "On its facts we think the case comes within the case of Delaware, L. & W. R. R. Co. v. Yurkonis, supra," 238 U.S. 439.

As noted in 12 Minnesota Law Review 499, 504,

> "The cook who provides the food to sustain the weary section hand in the performance of his duties on the right of way of an interstate railway * * * is about as far as the courts have been willing to go with the house that Jack built, in the inclusion of occupations under the act. The gravel pit laborer who digs the ballast for the right of way performs duties which are too remote from interstate commerce to be a part of it."

D. Administrative construction excluded quarry workers

For many years the Administrator has interpreted such quarry workers of local materialmen as not being engaged in commerce by reason of use of their materials in facilities of interstate transportation agencies in the same state.

(1) On July 15, 1939, Joseph Rauh, the Chief of the Opinion Section of the Administrator, in a widely-circulated answer to a direct inquiry from The National Sand and Gravel Association (which will file a brief as amicus curiae in No. 296) ruled that:

> "... employees engaged in the production of sand and gravel which is sold and used within the state of production in the repair or reconstruction of interstate highways * * * are not 'engaged in commerce' since their operations are of a local nature and are distinct from the operations of the repair and maintenance of interstate highways."

(2) In April, 1940, a succeeding chief of the opinion section, Milton Denbo, confirmed this interpretation.

(3) In July, 1940, Associate General Counsel Rufus Poole confirmed this interpretation.

(4) May 15, 1941, the Administrator in a formal release, G-162, paragraph VI (see 1944-1945 Wage-Hour Manual (B.N.A. 1945), p. 36, and C.C.H. Labor Law Service, vol. 2, p. 23,541, quoted with approval in *Wiley v. Stewart Sand & Material Co.*, 206 S.W. (2d) 362, 366) confirmed this interpretation as to the typical case of

> "... an employer who has contracted to repair a highway and has leased a gravel pit near the location of the job. In the pit his employees are engaged solely in digging gravel which is to be used within the state in the repair of the highway"

and concluded that

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used."

(5) On April 10, 1945, in a letter to the National Sand and Gravel Association (see 1944-1945 Wage and Hour Manual, p. 1498 and p. 1499) making more specific a new position as to production for commerce taken in a March 13, 1945 formal release, A-14, Administrator Walling restated that:

> "Employees of a materialman who are engaged in producing or delivering sand, gravel, or ready-mixed concrete or similar materials for use within the State where the materials are produced are not considered to be engaged in interstate commerce (as distinguished from the production of goods for commerce) except in situations where they participate in covered construction, repair, or maintenance of instrumentalities or facilities of commerce, as for example, by spreading such materials on the roadbed of an interstate highway."

(6) In the June 26, 1949 opinion in *McComb v.*

Trimmer, 85 F. Supp. 565, 567, it is stated that the Administrator "concedes" that employees at a quarry producing rock for interstate highways are not engaged in commerce. Judge Forman states:

> "Obviously—and the plaintiff concedes it—since the defendant's employees are not engaged directly upon, or associated with any instrumentality of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce * * * in producing gravel and shale for use in the repair and maintenance and improvement of county highways, concededly instrumentalities of commerce . . ."

(7) In the May, 1950, Interpretative Bulletin on General Coverage of the Wage and Hour Provisions, part 776, subpart A, in relation to engaging in commerce the Administrator goes no further than to say, in section 776.11 (Code of Federal Regulations, sec. 776.11, page 206 of 1951 Pocket Supplement) that:

> ". . . employees are considered engaged 'in commerce' where they provide to railroads, radio stations, airports, telephone exchanges, or other similar instrumentalities of commerce such things as electric energy, steam, fuel, or water, which are required for the movement of the commerce carried by such instrumentalities."

This interpretation, and its express basis of "direct furtherance" of "movement of the commerce carried by such instrumentalities", continues to exclude quarry workers from such "in commerce" coverage.

(8) As recently as the July 17, 1952 opinion in *Tobin v. Johnson,* 198 F. (2d) 130, 132, the Secretary of Labor, following his succession to the Administrator's right to bring legal proceedings under the act, did not contend that employees engaged in "quarrying and crushing rock" for use in maintaining and repairing vehicular highways carrying interstate traffic were engaged in commerce. As stated by Circuit Judge Woodrough,

> "Plaintiff does not contend, as he could not do so in view of the decided cases, that defendants' employees are 'engaged in commerce' . . ."

This contemporaneous and long-continued consistent course of administrative construction supports the conclusion that such a quarry employee is not engaged in commerce.

E. Federal and state court decisions under the act exclude quarry workers

The cases in point uniformly support the same conclusion under the Fair Labor Standards Act that such a quarry employee is not engaged in commerce: *Walling v. Craig,* 53 F. Supp. 479, 482, 493 (D.C. Minn. 1943; *E. C. Schroeder Co. v. Clifton,* 153 F. 2d 384, 388, 390, 392 (C.C.A. 10, 1946); *Crabb v. Welden Bros.,* 65 F. Supp. 369, 372, 375 (D.C. Iowa, 1946); *Wiley v. Stewart Sand & Material Co.,* 206 S.W. (2d) 362, 366 (Mo. App. 1947); *McComb v. Trimmer,* 85 F. Supp. 565, 567, 570 (D.C. N.J., 1949); *Tobin v. Johnson,* 198

F. 2d 130, 132; *Wecht*, Wage-Hour Law—Coverage, pages 78-79.

(1) In *Walling v. Craig*, 53 F. Supp. 479 (D.C. Minn. June 14, 1943, exactly one week after the decision in *McLeod v. Threlkeld*, 319 U.S. 491, of June 7, 1943, and in accordance with the principle there enunciated, it was held (at page 483) that:

> "Defendants' employees employed off the road and described generally as 'off-the-road employees' who produce and prepare local materials as sand, gravel, rock or earth, or who operate stationary off-the-road bituminous plants; are not engaged in the production of goods for commerce or in commerce or in work so closely related thereto as to be practically a part thereof and are not within the coverage prescribed by the Act."

As Judge Joyce (at page 482) described such "off-the-road employees of highway contractors who procured pits off the road from which they obtained the materials to build the highway base or surface required by their contracts:

> "This group of employees was engaged exclusively in opening such pits, excavating materials therefrom, screening or mixing the same therein and loading it upon tracks for transportation to the highway under contract or to stock-pile off the road. * * *
>
> "The work of all such employees operating off the road consisted exclusively in the preparation and loading of materials for use within the

state on the highway and did not require them to enter upon the highway in question."

(2) In *E. C. Schroeder Co. v. Clifton*, 153 F. 2d 385, 388, 390, 392 (C.C.A. 10, Jan. 24, 1946), where the trial court determined that plaintiffs, in quarrying and processing rock for use in connection with the construction of the relocated portions of the railroad track and the highway, were not engaged in commerce" Circuit Judge Phillips did not disagree on that "more narrow" question in his broader discussion of new construction leading to the same result and Circuit Judge Bratton delivered the sole opinion on this precise question:

> "In order to be engaged in commerce within the scope of the Act, the employee must be actually engaged in the movement of commerce or the service which he performs must be so closely related to it as to be for all practical purposes a part of it. McLeod v. Threlkeld, 319 U.S. 491. * * * Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production and processing of gravel cushion and riprap for use in the construction of relocated portions of the railroad and the highway are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act. McLeod v. Threlkeld, supra."

(3) In *Crabb v. Welden Bros.*, 65 F. Supp. 369, 372, 375 (D.C. Iowa, March 12, 1946), affirmed as to Crabb in 164 F. 2d 797, 803, 904 (C.C.A. 8, 1947), Crabb was employed as a timber foreman operating three

sawmills for the construction of the Alcan Highway, and Judge Dewey ruled that:

> "Mr. Crabb, however, has not established that he was so engaged in interstate commerce. He was not working on the highway or directly carrying supplies to and for it. He was what is known in the authorities as an 'off-the-road employee' and was not so closely connected with the commerce or transportation as to be a part of it. McLeod v. Threlkeld, 319 U.S. 491 * * *."

(4) In *Wiley v. Stewart Sand & Material Co.*, 206 S.W. (2d) 362, 366 (Kansas City Court of Appeals, Missouri 1947) Presiding Judge Cave reached a similar conclusion:

> "We conclude that the mere fact that plaintiffs engaged in the production of rock to be used on the highways and railroad beds within the State of Missouri, does not bring them within the Fair Labor Standards Act. They were not engaged in commerce * * *."

(5) In *McComb v. Trimmer*, 85 F. Supp. 565, 567, 570 (D.C. N.J. 1949), involving employees "producing gravel and shale for use in the repair and maintenance and improvement of county highways, concededly instrumentalities of commerce", Judge Forman reviewed the authorities and found it obvious that quarry employees were not engaged in commerce, saying:

> "Obviously—and the plaintiff concedes it—since the defendants' employees are not engaged directly upon or associated with any instrumental-

ity of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce. * * * They come strictly within the classification well adopted by other courts of 'off-the-road' employees and are not contemplated for coverage by the Act."

The principle established by the cases is recognized in *Herman A. Wecht,* Wage-Hour Law—Coverage (Joseph M. Mitchell, Philadelphia 1951), pages 78-79, where the learned author states that persons engaged in maintaining and repairing existing railroad facilities and highways indispensable to interstate transportation of goods and persons should be considered as engaged in commerce, but that in commerce coverage does not extend to several related situations:

". . . nor to 'off-the-road' employees, i.e., those who engage in working on and furnishing materials used in connection with various types of road and highway construction; * * *."

(6) As recently as July 17, 1952, in *Tobin v. Johnson,* 198 F. 2d 130, 132 (C.A. 8), where the employees were "engaged in quarrying and crushing rock" and aggregate for concrete for use in maintaining and repairing vehicular highways, Judge Woodbrough stated that:

"Plaintiff does not contend, as he could not do so in view of the decided cases, that defendants' employees are 'engaged in commerce' * * *."

For these several reasons the judgment of the Supreme Court of Pennsylvania that petitioner Thomas was not engaged in commerce should be affirmed.

POINT II.

A QUARRY WORKER DOES NOT PRODUCE GOODS FOR MOVEMENT, FOR TRANSPORTATION OR FOR COMMERCE WHEN HIS LOCAL MATERIALS AT ALL TIMES WITHIN ONE STATE ARE IMBEDDED IN NEARBY IMMOVABLE TRANSPORTATION STRUCTURES AND SO HE IS NOT COVERED BY THE FAIR LABOR STANDARDS ACT

By the same token, petitioner does not produce goods for commerce and is not within the other class of employees covered by the act. In his work at respondent's quarry, he is not *engaged in commerce* as we have seen under Point I, by reason of the imbedding of his local materials in concreted, permanent, fixed facilities of instrumentalities of interstate transportation in the same state. The reason is that commerce, in its applicable phase, transportation, is movement, and such quarry work is not so closely related to the movement as to constitute direct assistance to the functioning of that transportation. *The same definition of commerce excludes any coverage under* the act's second, alternate basis for coverage, *production of goods for commerce.*

In other words, looking only at the word commerce, the "commerce" for which goods are produced by the second class of employees covered by the act is not broader than the "commerce" *in* which the first class of employees covered by the act engage.

The same statutory definition of commerce applies to each of the dual bases for coverage. Section 3 (b), of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. sec. 203, provides that:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

This definition, as amended October 26, 1949, 63 Stat. 911, 29 U.S.C.A. sec. 20, pocket part, to cover imports too, reads:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

As stated in *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 512,

> "This definition is an exercise by Congress of its constitutional power 'To regulate Commerce with Foreign Nations, and among the several States, * * *.' * * * Such power has been held repeatedly to include the power to regulate interstate shipments or transportation as such, and not merely to regulate shipments or transportation of articles that are intended for sale, exchange or other trading activities."

Transportation is the only phase of commerce with which petitioner seeks to connect his production of local materials for local use in the same state. Plainly he does not produce rock and other local materials for "that commerce which concerns more states than one"

in any other meaning, for commercial "intercourse", for "traffic", for "buying and selling", *Gibson v. Ogden,* 9 Wheat. 1, 189, 194, or for "trade", "transmission", or "communication", in the other words of the act. His work did not involve, as commerce is most broadly defined in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 552:

> ". . . transactions which, reaching across state boundaries, affect the people of more states than one . . . affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing . . . intercourse across state lines . . ."

Under the statutory definition, then, of the single word "commerce", the applicable phase of interstate commerce, transportation, in which such a quarry employee must be engaged to be covered as "engaged in commerce" may be viewed as delimiting also the transportation for which an employee must be engaged in producing goods to be covered as "engaged in . . . the production of goods for commerce."

Or, as Chief Justice Marshall said in *Gibbons v. Ogden,* 9 Wheat. 1, 189,

> "The subject to be regulated is commerce. * * * If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it."

What then does "commerce", viewed as an isolated word, mean throughout the same single sentence

in section 7 referring to employees "engaged in commerce or in the production of goods for commerce", within the coverage of the act?

Commerce is movement, as this court has pertinently emphasized in *Industrial Accident Commission v. Payne,* 249 U.S. 182, 187, and has reiterated in *McLeod v. Threlkeld,* 319 U.S. 491, 497. Where transportation is the relevant phase of commerce, as reemphasized in *McLeod v. Threlkeld,* 319 U.S. 491, 496-497, the fact has been recognized and the law has been settled that:

> ". . . railroads carried commerce and were thus a part of it but . . . each employment that indirectly assisted the functioning of that transportation was not a part. The test . . . to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase 'production of goods for commerce'."

Concrete imbedded in a highway or railway is the antithesis of movement. Concrete is permanent, fixed, immovable. When rock and other local materials produced by a quarry worker thus enter into concreted fixtures of instrumentalities of commerce, that worker has not produced goods for movement, for transportation, for commerce.

On the other hand, the maintenance-of-way man working on the railroad right-of-way is closely related to movement of the commerce and to transportation. As L. E. Keller testified for the Brotherhood of Maintenance of Way Employees, in the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong. 1st Sess. (1937), at page 1160,

> "At different times of the day some of our section men or track forces are out flagging trains to protect some obstruction to the regular flow of traffic, and doing at times exactly the same work the train and engine service men perform."

While the maintenance-of-way man is thus "closely related to the movement of commerce" over the roadbed, that is very different from saying that the roadbed itself is commerce, or transportation, or movement.

At most, this court has said of vehicular roads and railroad tracks, in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 129-130, that:

> "If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce."

The employees "in commerce" in that case of a toll road and drawbridge were in commerce for the functional reason that they were "closely related to the interstate movement." Congress has never said that local materials produced to be imbedded in a roadbed are produced for commerce. In themselves, concrete structures, of transportation agencies, are not commerce under section 7.

Accordingly if goods are produced for a roadbed or fixed facilities of instrumentalities of interstate transportation, they are not produced for commerce, as commerce is defined, within the meaning of section 7 of the Fair Labor Standards Act, as it is written. As we have seen, they are not produced for any movement whatsoever. They are not produced for transportation, as that pertinent phase of commerce has been defined under the first of the act's two bases for coverage, in the same sentence of section 7. In this case, therefore, petitioner Thomas did not produce goods for movement, for transportation, for commerce, when his local materials at all times within one state were imbedded in immovable transportation structures, and so he was not covered by the Fair Labor Standards Act.

POINT III

PRODUCTION OF GOODS FOR COMMERCE ON THE PART OF A QUARRY WORKER IS NOT ESTABLISHED BY USE OF HIS LOCAL MATERIALS, IN THE SAME STATE, IN IMMOVABLE CONCRETE STRUCTURES OF INSTRUMENTALITIES OF INTERSTATE TRANSPORTATION, NONE OF HIS MATERIALS MOVING ACROSS STATE LINES

Again, petitioner Thomas in his work at respondent's quarry is not covered by the second of the act's dual bases for coverage for a further, fundamental reason. Since commerce is movement, as has been seen, he was not engaged in commerce because not closely related to that movement, and it was not for such movement that he was producing goods; so he was not producing goods for *commerce*. In addition, this second of the act's dual bases for coverage is not applicable because its applicability depends not only upon "commerce" but upon a distinct, entire concept expressed by the five words *production of goods for commerce*.

This further issue is brought into the sharpest possible focus by reason of the irrelevance to the facts here presented of the broader statutory coverage by section 3 (j) of "any closely related process or occupation directly essential to the production"; section 3 (j)

is irrelevant because this quarry worker Thomas was engaged in production itself, and the question is whether his production was of goods for commerce. Did he produce goods for commerce in work weeks when he produced rock that was later imbedded, with the other materials forming concrete, in highways, or in a railroad right-of-way, or in an airfield landing strip?

A. Supreme Court cases

This second statutory basis, "production of goods for commerce", has been considered by the Supreme Court in a number of cases, and in no case has it been applied where the production of goods for commerce did not entail transportation across state lines: *Warren-Bradshaw Drilling Co. v. Hall,* 317 U.S. 88, 92 ("oil produced by the wells drilled, would move into other states"); *Walton v. Southern Package Co.,* 320 U.S. 540, 541 ("the manufactured product was destined for shipment in interstate commerce"); *Armour & Co. v. Wantock,* 323 U.S. 126, 127 ("soap factory in Chicago which . . . . produces goods for interstate commerce"); *Roland Electrical Co. v. Walling,* 326 U.S. 657, 662, 664 ("'shipping at least a substantial portion of their total production to points outside the State' * * * petitioner's customers, use electric motors in the production of goods for interstate commerce"); *Martino v. Michigan Window Cleaning Co.,* 327 U.S. 173, 177 ("in the midst of producing the 'flow of goods in commerce' intended to be covered by the Act"); *Mabee v. White Plains Pub. Co.,* 327 U.S. 178, 183 ("news-

paper with a regular out-of-state circulation"); *Powell v. United States Cartridge Co.*, 339 U.S. 497, 511 ("such production was for transportation outside of the state"), and other cases which might be cited.[8]

In the most recent decision, *Powell v. United States Cartridge Co.*, 339 U.S. 497, 513, reference is made to the "jurisdictional fact—that at the time the munitions were produced they were intended for interstate transportation * * *." The Supreme Court has gone no further toward the facts here presented. The very reason that this second statutory basis was held constitutional in *U.S. v. Darby*, 312 U.S. 100, 113, 117, was that goods were produced "for shipment interstate" and

> "While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of

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[8] Thomas in his petition for certiorari at page 8 relied upon language relating to the very different issue under section 3 (j) in Roland Electrical Co. v. Walling, 326 U.S. 657, 663, where, in stating that "This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several states" the court immediately restated its meaning that "It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several states." The employees there repaired electrical motors for Baltimore concerns "shipping at least a substantial portion of their production to points outside the State of Maryland" and were necessary to such production of goods crossing state lines.

such shipment by Congress is indubitably a regulation of the commerce. * * * The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it."

B. Legislative history

The movement of the proscribed product across state lines inherent in the statutory coverage of employees engaged in the production of goods for commerce is emphasized throughout the Congressional history of the Fair Labor Standards Act. The measure wound its way through a long legislative process briefly noted in *Roland Electrical Co. v. Walling,* 326 U.S. 657, 668, note 5.

B-1. Presidential message of May 24, 1937

The bill was introduced May 24, 1937, as S. 2475 and H.R. 7200, accompanied by a Presidential message.[9]

[9] The sponsor of the Bill agreed that the Bill was "intended to carry out the suggestions made by the President in his message." 81 Cong. Rec. 4960, 4961, see also House Report No. 1452, page 8, 75th Cong., 1st Sess., and Roland Electrical Co. v. Walling, 326 U.S. 657, 668, note 5. The Presidential Message, 81 Cong. Rec. 4960-4961 of May 24, 1937, was accorded first place in the Committee Reports: Senate Report No. 884, pages 1-3 and House Report No. 1452, pages 5-7.

The President said:

> "The time has arrived for us to take further action to extend the frontiers of social progress. * * * when goods pass through the channels of commerce from one State to another they become subject to the power of the Congress * * * we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. * * * a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend * * *."

B-2. Conference Report of June 11, 1938

After passage by the House May 24, 1938 (83 Cong. Rec. 7449) the measure went to conference between the two Houses, and was reported out of conference with several amendments in substantially its present form: House Report No. 2738, 75th Cong., 3d Sess., June 11, 1938. The report (page 4) eliminated any "industry affecting commerce" coverage as well as "employer engaged in commerce" coverage and restricted the measure to coverage of employees "engaged in commerce or in the production of goods for commerce."

B-3. Senate debate of June 14, 1938

Prior to adoption of the conference report in both houses on June 14, 1938, there was illuminating debate in the Senate, on June 14, after Senator Thomas submitted the report: 83 Cong. Rec. 9158-9162.

Senator Thomas, in explaining the conference agreement, as a "compromise," stated, at page 9163, that:

> "Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor."

A second conference, Senator Borah stated (at page 9167):

> "If he is working in the production of goods which are being prepared for interstate commerce, and it is part of the system to ship the goods in interstate commerce, the whole transaction is interstate commerce, as was held by the court, in the Jones & Laughlin case. * * *

As Senator Borah summarized his argument (at page 9170),

> "I do not contend that the Court has clearly stated that where there is a business entering the channels of interstate trade and like shipments or any other transaction, and the workers are a necessary part of carrying on that business, although a

worker may not be in the channels of interstate trade at all, he may simply be manufacturing the stuff or preparing it for shipment, the Court has held that he may be controlled by the Federal Congress."

Senator Wheeler, one of the authors of the measure adopted by the Senate (see 323 U.S. at 497, n. 11), challenged the "instrumentality of interstate commerce" theory advanced by Senator Bailey in debate with Senator Borah and pointed out that:

> ". . . under the Railroad Employers' Liability Act, in order to recover a worker had to be actually engaged in interstate commerce. * * * In order to recover under the Federal Employers' Liability Act one had to show that the man was actually engaged in the actual transportation of goods. * * * the machinist who was working in the shop has never been held to come under the Employers' Liability Act, * * * in my judgment a corporation which is engaged in carrying on an interstate commerce business should come under the jurisdiction of the Congress of the United States; but I do question whether the Court will hold that it does." [10]

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[10] 83 Cong. Rec. 9170, 9171. Senator Bailey of North Carolina, whose views did not prevail, was "merely saying that a worker in a machine shop on a railroad who never left the State in his life but who was repairing engines engaged in interstate commerce" "would be a part of the system" "the entire railroad organization is an instrumentality of commerce between the States" "everybody working in it is necessarily a part of the instrumentality": 83 Cong. Rec. 9170, 9169.

Senator Pepper, a conferee, in discussing (83 Cong. Rec. 9168) "what is in this bill as to the objectives of the bill and its application legally" similarly stated that:

> "The power to affect those employed in interstate commerce is, I assume, definitely admitted by the Senator from North Carolina. Jurisdiction over employees engaged in the production of goods for interstate commerce is as vital to the exercise of the power to regulate commerce as the source of a river is to the river itself or the origin of a spring to the stream which flows away from it.
>
> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

The Fair Labor Standards Act has effective scope and coverage over employees engaged in production (or any closely-related process or occupation directly essential to the production) of any commodity, or part or ingredient thereof, that moves in interstate commerce or passes a State border. Beyond that, Congress was not prepared to go, as the legislative history discloses.

C. Contemporaneous administrative construction

Administrative construction for years excluded from coverage quarry workers whose materials were merely used in repair and maintenance of instrumentalities of commerce in the same state, and the ice cases did not require the Administrator to assert a belated, retroactive extension of coverage.

In strict accord with the Supreme Court cases and the Congressional history and intent, the Administrator early construed the Fair Labor Standards Act not to cover quarry workers whose local materials were merely used in repair and maintenance of instrumentalities of commerce in the same state. It should suffice to refer to formal release G-162, issued by the Administrator on May 15, 1941."

The Administrator on May 15, 1941, referred to the typical, illustrative case of

". . . an employer who has contracted to repair a highway and has leased a gravel pit near

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" 1944-1945 Wage Hour Manual, page 36, 2 C.C.H. Labor Law Service, vol. 2, para. 23,541, quoted with approval in Wiley v. Stewart Sand & Material Co., 216 S.W. (2d) 362, 366; that release confirmed a ruling of July 15, 1939, by the Chief of the Opinion Section to the National Sand and Gravel Association that employees engaged in the production of sand and gravel which is sold and used within the state of production in the repair or reconstruction of interstate highways are not engaged in commerce since their operations are of a local nature and are distinct from the operations of the repair and maintenance of interstate highways and "Furthermore they are not engaged 'in the production of goods for commerce', since the goods they produce do not move across state lines."

> the location of the job. In the pit his employees are engaged solely in digging gravel which is to be used within the state in the repair of the highway . . . "

and re-affirmed his consistent, contemporaneous construction of the act that:

> "Employees engaged in producing materials such as sand, gravel, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' * * *. Neither are such employees engaged in producing goods for commerce."

It was not until 1945, almost seven years after enactment of the Fair Labor Standards Act of 1938, that the Administrator broadened considerably his interpretation of the phrase "production of goods for commerce."[12]

The Administrator expressly "modified" his prior "narrower interpretation of production 'for commerce,'" and stated that the "courts have indicated that goods are produced 'for commerce,' even though

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[12] Release A-14 issued March, 1945, 1944-1945 Wage and Hour Manual pp. 1947-1948; incorporated in May, 1950, Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 Code of Federal Regulations, sec. 776.7(c), 15 F.R. 2925.

they do not subsequently leave the state, if they are produced in order to supply the needs of interstate commerce . . ." [13]

This volte face was purely a matter of legal opinion, expressly predicated by the Administrator upon three so-called "ice cases", and the Administrator stated that:

> "In the light of these decisions, it is my opinion that the Fair Labor Standards Act, in its application to employees engaged in the production of goods for interstate commerce, is not limited to employees engaged in the production of goods for shipments across state lines."

In his 1945 release (1944-1945 Wage and Hour Manual 1497) the Administrator invoked three cases, *Atlantic Company v. Walling*, 2 WH 198, *Chapman v. Home Ice Company*, 6 WHR 570, and *Hamlet Ice Company, Inc. v. Fleming*, 2 WH Cases 131, which, as he said, applied the act to employees engaged in the manufacture and local delivery of "ice for the refrigeration of interstate freight shipment," of "ice to railroads

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[13] "or to serve as an essential part of such commerce or to aid or facilitate the carrying on of interstate commerce by essential instrumentalities or facilities of commerce such as interstate railroads, highways, telegraph or telephone systems, pipe lines, airports, harbors and the like." 1944-1945 Wage and Hour Manual 1948. The release referred expressly to "producing ice . . . crushed rock . . . ready-mixed concrete . . . for use or consumption within the same state . . . in the maintenance, repair, or construction of essential instrumentalities of interstate . . . transportation . . ." The word "construction" was later changed to "reconstruction": 29 C.F.R. sec. 776.7

and merchants for refrigeration of perishable commodities moving in interstate commerce and for the cooling of interstate passenger cars" and of "ice . . . for use in operation of interstate trains."

The Administrator's belated repudiation in 1945 of his consistent, contemporaneous construction of this 1938 legislation was not supported by the cases which he supposed, as a matter of law, required such retroactive enlargement of coverage. We have carefully examined those cases: *Hamlet Ice Co., Inc. v. Fleming,* 127 F. 2d 165, 170 (C.C.A. 4, 1942, "It is conceded that the ice was bought for shipment to other states"), cert. den. 317 U.S. 634; *Atlantic Co. v. Walling,* 131 F. 2d 518, 521 (C.C.A. 5, 1942, the "ice . . . moves in commerce"); *Chapman v. Home Ice Co. of Memphis,* 136 F. 2d 353, 354-355 (C.C.A. 6, 1943, "ice . . . is transported from state to state"), cert. den. 320 U.S. 761. In each case the employees were engaged in the production of goods for shipment across state lines. The cars iced were next iced if at all at points outside the state. These cases correctly refused to restrict the term "commerce" as used in the act to "goods traded in in interstate commerce" or to goods intended "for sale . . . across state lines." The act is not limited to shipments or transportation of articles that are intended for sale, exchange or other trading activities, and the Supreme Court has since explicitly held, in *Powell v. United States Cartridge Co.,* 339 U.S. 497, 512, that:

> "Congress included, by express definition of terms, employees engaged in the production of goods for interstate *transportation.*"

"Goods" means, too, "any part or ingredient" of the commodities iced. Congress had long since declared "the interstate character of the icing service of goods in commerce" as pointed out by the Supreme Court of Pennsylvania in this case (T. 26), by providing in section 1 (3) of the Interstate Commerce Act of 1887, as amended, 49 U.S.C.A. sec. 1 (3), that "transportation" includes "all services in connection with the . . . refrigeration or icing . . . of property transported."

Under these circumstances, the original, contemporaneous construction of the Fair Labor Standards Act of 1938 may properly be resorted to for guidance. In the absence of any statutory provision as to what, if any, deference courts should pay to the Administrator's conclusion, the Supreme Court, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, has said this:

> Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. * * *
>
> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

> and all those factors which give it power to persuade, if lacking power to control."

Adherence to the original, contemporaneous construction avoids variance in this case between the standards for public enforcement and those for determining private rights against respondent, for the Administrator has never taken any enforcement action on the basis of his reversal of opinion in 1945 for any period prior to April 15, 1945. Disregard of the 1945 volte face is in line with the ruling in *Jewell Ridge Coal Corporation v. Local No.* 6167, *U.M.W.A.*, 325 U.S. 161, 169, that:

> "This statement, being legally untenable, lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions."

The 1945 ruling was a purely legal interpretation by the Administrator's legal staff, made two or three years after the ice cases supposed to require such change. The justification for utilizing "administrative interpretation" as a gloss on ambiguous legislation extended, in this instance, only to the original, contemporaneous administrative construction consistently adhered to for almost seven years with (see Point III-D) judicial concurrence.

In harmony with the decisions of the Supreme Court and with the congressional history of the Fair Labor Standards Act of 1938, the administrative construction for years excluded from coverage quarry workers whose materials were merely used in repair and maintenance of instrumentalities of commerce in the same state.

D. Federal and state cases

Most cases over a period of years have held the act inapplicable to a quarry worker producing materials used by interstate transportation agencies in the same state.

The issue presented has been considered by federal and state courts over a period of years, and the act has been held not to apply to employees at quarries, cement plants or gravel pits, merely by reason of the use of the locally produced quarry materials or cement in the same state or territory in highway or railroad maintenance or repairs: *Walling v. Craig,* 53 F. Supp. 479, 483, (D.C. Minn. 1943); *Ramos v. Puerto Rico Cement Corp.,* 10 C.C.H. Labor Cases, para. 63,000, 5 WH Cases (D.C. P.R. 1946); *Wiley v. Stewart Sand & Material Co.,* 206 S.W. (2d) 362, 366 (Mo. App. 1947); *McComb v. Trimmer,* 85 F. Supp. 565, 567-569 (D.C. N.J. 1949). As stated by Judge Cooper in the Ramos case:

> "The cement produced by plaintiffs * * * once it was used in the repair of a highway remained in Puerto Rico. Cement becoming part of a road in Puerto Rico certainly has not been produced for interstate commerce."

Walling v. Craig, 53 F. Supp. 479, was indeed decided before the Administrator's assertion, based upon the so-called "ice case" that these employees were covered, but it was a square decision, in harmony with the contemporaneous construction of the act by the Administrator himself although based solely upon the

court's judicial construction of the act. *McComb v. Trimmer*, 85 F. Supp. 565, considered and rejected the Administrator's belated assertion of coverage. From the beginning, then, the courts have held the act inapplicable under such circumstances.

The Administrator also failed to secure judicial acceptance of his ice-cases inspired 1945 assertion of broader coverage in *E. C. Schroeder Co. v. Clifton*, 153 F. 2d 385, 388, 389-390, 393 (C.C.A. 10, 1946), cert. den. 328 U.S. 858, where Judge Phillips did not disagree on the "more narrow" question covered in Judge Bratton's full opinion announcing the judgment of the court. Judge Bratton considered the ice cases and the Administrator's new theory and (at page 388, 309) said:

> "Here, it was not intended that any of the cushion gravel and riprap would ever move in interstate commerce. It was understood from the beginning that it would be produced, processed, and transported to points on the relocated segments of the railroad and the highway, all within the same state. * * * If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality it certainly would have employed apt words to express the intention. We fail to find anything in the language of the Act or its legislative history which lends support to the view that Congress purposed to bring workmen of that class within the coverage."

See further T. 24, 25, 27.

Nothing to the contrary was held in *McComb v. Carter*, 16 C.C.H. Labor Cases para. 69,964 (D.C.E.D. Va. 1948), where, following the affirmance of the circuit court's reversal of the district court in *Roland Electrical Co. v. Walling*, 326 U.S. 657, Judge Bryan granted an injunction as to truck drivers, briefly stated to be engaged in commerce and in production of goods for commerce, engaged in transportation in "trucks to construction sites of materials used in the maintenance, repair and reconstruction within the State of Virginia of highways."

The first judicial decision applying the ice cases in the Administrator's favor on this point was handed down in *Tobin v. Alstate Construction Co.*, 195 F. 2d 577 (C.A. 3, 1952), and that case is now pending at No. 296 October Term, 1952, for argument, with this case, the week of February 2, 1953. A brief filed in that case, at No. 296 October Term, 1952, by National Sand & Gravel Association as Amicus Curiae is here incorporated by reference and the court is requested to consider the basic contentions therein presented in their bearing upon this Hempt case. There were numerous classes of employees in that case, including mixers and other plant employees who produced blacktop to resurface highways as well as private projects unconnected with interstate commerce. An injunction, prospective only, was predicated upon "in commerce" coverage (95 F. Supp. 585, 588-589) and affirmed, with a reference to the "rationale" of the so-called "ice cases," under the "principles" laid down in *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129 ("in commerce" coverage, see Points I and II supra) and in *Roland Electrical Co. v. Walling*, 326 U.S. 657, 663

("necessary to production" coverage, see Point III-A, supra).[14]

Thereafter, the Supreme Court of Pennsylvania carefully analyzed (T. 23-26) the Alstate case, and concluded on June 24, 1952, that petitioner Thomas was not engaged in the production of goods for commerce.

The foregoing additional factor, therefore, for the Supreme Court's consideration, is that most cases over a period of years have held the act inapplicable to comparable employees producing materials such as rock and cement used by interstate transportation agencies in the same state.

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[14] Since Judge Kalodner rested the Alstate decision primarily upon the Roland case, and Thomas in his petion for certiorari at page 8 relied upon the same language from that Roland case, we repeat at this point for convenience a brief comment (see Point III-A, supra, first note). On the very different issue under section 3(j) in Roland Electrical Co. v. Walling, 326 U.S. 657, 663, in stating that "This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several states" the Supreme Court immediately restated its meaning that "It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'articles or subjects of commerce of any character' which are produced for trade, commerce, or transportation among the several states." The employees there repaired electrical motors for Baltimore concerns "shipping at least a substantial portion of their production to points outside the State of Maryland" and were necessary to such production of goods crossing the state lines. The same Roland language was again misapplied in Tobin v. Johnson, 198 F. 2d 130, 133 (C.A. 8, 1952) where a petition for certiorari has been filed.

E. The act itself

The act itself expresses the intention of Congress to cover production of goods for movement across a state line and refrains from covering an employee at a quarry whose material is used in one and the same state in roadbeds and structures of instrumentalities of commerce.

E-1. The act distinguishes two classes covered

The Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U.S.C.A. sec. 201, 207, et seq., in section 7 applied its overtime provisions to any employees "engaged in commerce or in the production of goods for commerce . . ." An employee engaged in the production of goods for commerce was thus recognized as belonging in a second class separate and apart from the first class of employees covered by the act because they were engaged in commerce.

The distinct nature of the two separate covered classes of employees is further apparent in the very different provisions made by Congress as to "necessary" occupations. In Section 3(j) of the 1938 Act Congress, in defining "produced," extended coverage of the second class (so broadly that the extension may well be considered a third class in itself) to include an employee employed "in any process or occupation necessary to the production thereof, in any State." No analogous provision was made in relation to the first

class covered for coverage of an employee employed in any process or occupation necessary to commerce. This difference in treatment has been continued in the amendments of October 26, 1949, 63 Stat. 911, which in this respect changed only the concluding clause of section 3(j) so that it now reads "or in any closely related process or occupation directly essential to the production thereof, in any State."

A comparable distinction, referring however to "industries" rather than to "employees," appears in Section 2, 52 Stat. 1060, 29 U.S.C.A. sec. 202(a), where Congress, as the very foundation of the act, makes its findings in relation to industries "engaged in commerce or in the production of goods for commerce . . ."

The same distinction appears in section 6, 52 Stat. 1060, 1062, 29 U.S.C.A. sec. 206(a) where the minimum wage provisions are made applicable to each employee "engaged in commerce or in the production of goods for commerce . . ."

An analogous distinction, by virtue of the Act of October 26, 1949, 63 Stat. 917, 29 U.S.C.A. sec. 212 pocket part, appears also in the section 12 child labor provisions, where subsection (c) provides that

> "No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce."

As originally enacted in 1938, 52 Stat. 1060, 1067 ("no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced") the child labor provisions plainly regulated production of goods for commerce.

The second distinct class of employees engaged in the production of goods for commerce, does not include employees, in the first class, engaged in commerce. This is emphasized by the definition in section 3(j) of "Produced" to mean "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods . . ." The "transporting", like the handling, or manufacturing, in the context, is intended to cover an employee in any such "manner working on such goods," and indeed is comprehended without being itemized in the initial reference to "handled or in any other manner worked on in any State" in this definition of "Produced." Such terms do not include the handling, transporting or working on which accomplishes "the interstate transit or movement in commerce itself," see *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 503, and

> "They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce."

Thus, the Fair Labor Standards Act of 1938 embodies and expresses a fundamental distinction between two classes of employees. Its overtime provisions apply to a first class of employees engaged in commerce and to a second class of employees engaged in the production of goods for commerce. The second class was not intended to overlap and swallow up the first. 'Production of goods for commerce does not include engaging in commerce. See *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 504.

The distinction is fundamental and important in its consequences. Consider, for example, the case of the bolt-carrying employee in the Pedersen case. In *Overstreet v. North Shore Corporation*, 318 U. S. 125, 130, the Supreme Court said:

> "Those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' even as was the bolt carrying employee in the Pedersen case, supra. . . ."

The case of *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146 (1913) arose out of repairs near Hoboken on an interstate railroad to a railroad bridge and tracks, and held that an ironworker, engaged with other railroad employees in taking out an existing girder and inserting a new one on the railroad bridge, struck by a passenger train while he was "carrying a sack of bolts or rivets" over a temporary intervening bridge, was employed "in interstate commerce." The bolt-carrying employee in the Pedersen case would be "engaged in commerce" within the meaning of the Fair Labor Standards Act, as the Overstreet case indicates. And yet he would be at the same time engaged in the production of goods for commerce, if the Administrator's ice-case inspired construction be accepted, in that he was handling bolts or rivets "necessary" for an instrumentality of commerce. He would be producing for the railroad roadbed, for the bridge on which was laid the tracks on which ran the train in which was transported articles or subjects of commerce. Yet if he is brought within the second class of employees engaged in producing goods for commerce,

then his case is no longer a border-line case (Mr. Justice Lamar, Mr. Justice Holmes and Mr. Justice Lurton dissented) of "in commerce" coverage. On the contrary, through covering him, the act extends to "any closely related process or occupation directly essential" to his production of goods necessary for fixed facilities of an instrumentality of commerce in the same state.

Accordingly the Administrator's inflated conception of production of goods for commerce in the sense of production for local use in railroads, highways and instrumentalities over which interstate traffic flows, must be rejected, as in conflict with and tending to obliterate the act's consistent distinction, maintained in section 7, between two separate covered classes of employees, engaged in commerce on the one hand, or on the other hand engaged in the production of goods for commerce.

E-2. The act distinguishes commerce and instrumentalities thereof

The act makes only one reference to instrumentalities of commerce. In Section 2(a), 52 Stat. 1060, 29 U.S.C.A. sec. 202(a),

> "The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes com-

merce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States * * *"

This reference may be traced back to the House Amendments, House Report No. 2182, 75th Cong., 3d Sess., April 21, 1938. As stated in the House Report, at page 7,

> "The committee amendment states that the above-described situation requires that Congress exercise its power under the Constitution to regulate commerce among the several States in order to prevent the instrumentalities of interstate commerce to be used to spread and perpetuate such substandard labor conditions by prohibiting the shipment in interstate commerce of goods produced under substandard labor conditions and providing for the elimination of substandard labor conditions among employers engaged in industries affecting interstate commerce."

The proposed extension of the act to "industries affecting interstate commerce" was eliminated prior to final passage of the act but the reference to "instrumentalities" of commerce was retained. The reference in section 2 is to use of instrumentalities of commerce to "spread" substandard labor conditions "among the workers of the several States." The same section refers also to "flow of goods in commerce," "competition in commerce," and "marketing of goods in commerce." Congress explicitly referred to "instrumentalities of commerce" when it meant instrumentalities of commerce, but did not include instrumentalities of com-

merce in the immediately succeeding section 3 where Congress defined "commerce." Congress defined commerce; it did not define instrumentalities of commerce, and did not include instrumentalities of commerce in the definition of commerce. The "instrumentality idea as applied to railroads" was definitely rejected: 83 Cong. Rec. 9169, 9170, 9168.

E-3. The act relates to goods as subjects of commerce

Furthermore, the act defines goods as subjects of commerce. Section 3(i); 52 Stat. 1060, 1061, 29 U.S. C.A. sec. 203 (i), provides that

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *."

By its very breadth this definition contemplates as goods "subjects of commerce" that are produced for interstate transportation, whether or not intended for sale, exchange or other trading activities. Goods within this definition must be subjects of commerce that are put as goods into the stream of interstate commerce for movement in the channels of such commerce, passing with the stream toward another state. Rock imbedded in the state of its production in a roadbed never becomes a subject of interstate commerce or transportation.

E-4. The act relates to production for transportation in the ordinary meaning of interstate transit or movement in commerce

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The Fair Labor Standards Act of 1938 defined commerce as meaning transportation. Section 3(b), later amended in 1949 to cover imports also, originally, 52 Stat. 1060, 29 U.S.C.A. sec. 203(b) provided that.

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Transportation, the phase of commerce relevant to this case, was not expressly defined. As shown by the context in the definition itself, it meant "transportation . . . among the several States," and so presupposed transportation that at some point crossed a state line. That the transportation contemplated was transportation crossing a state line was shown by the similar context in the latter part of the definition referring to "transportation * * * from any State to any place outside thereof."

Throughout the act transportation is used (we have supplied the italics of course) in the sense of transit or movement. As enacted in 1938, section 3(f), 52 Stat. 1060, 29 U.S.C.A. sec. 203 (f), defining "Agriculture," spoke of "delivery * * * to carriers for *transportation* to market." Section 8(c) (1), relating to minimum wage orders directed the industry committee and the Administrator, 52 Stat. 1060, 1064, 29

U.S.C.A. sec. 208(c) (1), to consider "competitive conditions, as affected by *transportation*, living and production costs; * * *" Section 15 (a) (1), 52 Stat. 1060, 1068, 29 U.S.C.A. sec. 215(a) (1) made it unlawful

> "(1) to transport, offer for *transportation*, ship, deliver, or sell in commerce * * * any goods in the production of which any employee was employed in violation of section 6 or section 7 * * * except that no provision of this Act shall impose any liability upon any common carrier for the *transportation* in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for *transportation*; * * *"

Transportation, derived from the Latin transportatio, is thus used in its ordinary dictionary usage of carriage or conveyance from place to place. As in ordinary speech, so in the Fair Labor Standards Act, transportation is the act of transporting. Transportation, as distinguished from production for it, see *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, 503, serves a useful purpose when read to relate to "the interstate transit or movement in commerce itself."

The act itself—in defining its application to employees engaged in the *production of goods for commerce, as distinguished* (Point E-1, supra) *from* employees engaged *in commerce*, again as distinguished from production for (Point E-2, supra) an *instrumentality* of commerce, and also as specifically related to

that phase of commerce defined as *transportation* (Point E-4, supra, as distinguished from production for it) in the ordinary meaning of interstate transit or movement in commerce—expresses the intention of Congress to cover employees engaged in production of goods or subjects of commerce (Point E-3) for movement across a state line. The language of the Fair Labor Standards Act does not cover petitioner Thomas. He did not produce goods for commerce.

CONCLUSION

Petitioner, therefore, was engaged neither in commerce nor in the production of goods for commerce, and the judgment of the Supreme Court of Pennsylvania should be affirmed. Both questions presented should be answered in the negative.

(1) Petitioner in his work at respondent's quarry was not "engaged in commerce" and was not so closely related to interstate transportation as to be in practice and legal relation a part thereof.

(2) The "production of goods for commerce" does not extend to production of goods necessary for instrumentalities of commerce so as to bring within the coverage of section 7 of the Fair Labor Standards Act of 1938 petitioner's production at respondent's quarry of rock and other materials for concrete thereafter imbedded in highways and other structures of

instrumentalities of interstate commerce within one and the same state.

Respectfully submitted,
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